Calendar No. 103

107TH CONGRESS
2d Session

SENATE

REPORT
107–147

THE LOCAL LAW ENFORCEMENT ENHANCEMENT ACT OF 2001

MAY 9, 2002.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[Including cost estimate of the Congressional Budget Office]

[To accompany S. 625]

The Committee on the Judiciary, to which was referred the bill (S. 625) to provide Federal assistance to States and local jurisdictions to prosecute hate crimes, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

CONTENTS

		Page
I.	Purpose	2
II.	Pre-existing law and the need for expanded jurisdiction	3
III.	The Local Law Enforcement Enhancement Act of 2001	8
IV.	Federalization	10
V.	Constitutional basis	14
VI.	Not all crimes are hate crimes	24
VII.	Examples of violent hate crimes not covered by existing law	26
VIII.	Conclusion	31
IX.	Cost estimate	31
X.	Regulatory impact statement	33
XI.	Minority view of Senator Hatch	34
XII.	Changes in existing law	41

99–010

I. PURPOSE

Although America experienced a significant drop in violent crime during the 1990's, the number of reported hate crimes has grown by almost 90 percent over the past decade. From 19912000, according to FBI statistics, there were over 73,000 reported hate crimes in the United States.[1] That equals an average of 20 hate crimes per day for 10 years straight.

Recent hate-motivated killings in Virginia, Texas, Wyoming, California, Illinois, and Indiana have demonstrated the destructive and devastating impact the crimes have on individual victims and entire communities. Since September 11, 2001, the Department of Justice has been involved in investigating over 350 incidents of potential hate-motivated violence against Arab-Americans, Muslims, and Sikhs. However, to date the Department has only brought hate crime indictments in 3 cases. Too often and for too long, the Federal Government has been forced to stand on the sidelines in the fight against these senseless acts of hate and violence because of the limits in existing law.

Senate bill 625, the Local Law Enforcement Enhancement Act of 2001 ("Hate Crimes Act") is intended to address two serious deficiencies in the principal Federal hate crimes statute, 18 U.S.C. 245. Enacted in 1968, the existing Federal statute prohibits a limited set of hate crimes committed on the basis of race, color, religion, or national origin. The two deficiencies are as follows: (1) the existing statute requires the Government not only to prove that the defendant committed an offense because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of six narrowly defined, "federally protected activities;" and (2) the existing statute provides no coverage whatsoever for violent hate crimes committed because of bias based on the victim's sexual orientation, gender, or disability. Together, these deficiencies limit the Federal Government's ability to work with State and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes. In some cases, the deficiencies entirely preclude the vindication of the Federal interest in fighting bias-motivated violence.

The hate crimes bill amends title 18 of the United States Code and creates a new section 249 to address the jurisdictional limitations under existing law. In particular, section 249 establishes two criminal prohibitions entitled "hate crime acts." In cases involving racial, religious, or ethnic violence, the new section 249(a)(1) prohibits the intentional infliction of bodily injury without regard to the victim's participation in one of the six specifically enumerated "federally protected activities." In cases involving violent crimes motivated by hatred based on the victim's actual or perceived sexual orientation, gender, or disability, the new section 249(a)(2) prohibits the intentional infliction of bodily injury whenever the incident has a nexus, as defined in the bill, to interstate commerce. The reasons for the discrepancy between (a)(1) and (a)(2) are discussed in part IV of the report. These amendments to title 18 of the U.S. Code will permit the Federal Government to work in partnership with State and local officials in the investigation and pros-

[1] Reported hate crimes incidents by year: 1991 (4,558); 1992 (6,623); 1993 (7,587); 1994 (5,932); 1995 (7,947); 1996 (8,759); 1997 (8,049); 1998 (7,755); 1999 (7,876); 2000 (8,063).

ecution of cases that implicate the significant Federal interest in eradicating hate-based violence.

It is important to emphasize Congress' expectation that State and local law enforcement agencies will continue to play the principal role in the investigation and prosecution of all types of hate crimes, including gender-based crimes and others for which Federal jurisdiction has been created by this bill. Concurrent Federal jurisdiction is necessary in the hate crimes context to permit joint State-Federal investigations and to authorize Federal prosecutions in limited circumstances—for example, where the State lacks jurisdiction or declines to assume jurisdiction, where the State requests that the Federal Government assume jurisdiction, or where actions by State and local law enforcement officials have left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

II. Pre-Existing Law and the Need for Expanded Jurisdiction

1. The "Federally Protected Activity" requirement of 18 U.S.C. 245(b)(2)

18 U.S.C. 245(b) has been the principal Federal hate crimes statute since its enactment in 1968. It prohibits the use of force, or threat of force, to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) "any person because of his race, color, religion or national origin" and because of his and her participation in any of six "federally protected activities" specifically enumerated in the statute.

The six enumerated "federally protected activities" are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any State or local government; (C) applying for or enjoying employment; (D) serving in a State court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation.

Federal jurisdiction exists under 18 U.S.C. 245(b)(2) only if a crime motivated by racial, ethnic, or religious hatred has been committed with the intent to interfere with the victim's participation in one or more of the six federally protected activities. Even in the most blatant cases of racial, ethnic, or religious violence, no Federal jurisdiction exists under this section unless the federally protected activity requirement is satisfied. This unnecessary intent requirement has limited the ability of Federal law enforcement officials to work with State and local officials in the investigation and prosecution of many incidents of brutal, hate-motivated violence and has led to acquittals in several of the cases in which the Department of Justice has determined a need to assert Federal jurisdiction.

The most important benefit of concurrent State and Federal criminal jurisdiction is the ability of State and Federal law enforcement officials to work together as partners in the investigation and prosecution of serious crimes. When Federal jurisdiction has existed in the limited hate crimes contexts authorized by 18 U.S.C. 245(b), the Federal Government's resources, forensic expertise, and experience in the identification and proof of hate-based motivations

has often provided an invaluable investigative complement to the familiarity of local investigators with the local community and its people and customs. It is by working together cooperatively that State and Federal law enforcement officials stand the best chance of bringing the perpetrators of hate crimes swiftly to justice.

The investigation conducted into the death of James Byrd in Jasper County, TX, is an excellent example of the benefits of an effective State-Federal hate crimes investigative partnership. From the time of the first reports of Mr. Byrd's death, the FBI collaborated with local officials in an investigation that led to the prompt arrest and indictment of three men on State capital murder charges. The resources, forensic expertise, and civil rights experience of the FBI and the Department of Justice provided assistance of great value to local law enforcement officials.

It is also useful in this regard to consider the work of the National Church Arson Task Force, which operates pursuant to jurisdiction granted by 18 U.S.C. 247 and other Federal criminal statutes that have no jurisdictional limitations analogous to the "federally protected activity" requirement of 18 U.S.C. 245(b)(2). Created in mid-1996 to address a rash of church fires across the country, the task force's Federal prosecutors and investigators from ATF and the FBI collaborated with State and local officials in the investigation of every church arson that had occurred since January 1, 1995. The results of these State-Federal partnerships were extraordinary. Thirty-four percent of the joint State-Federal church arson investigations conducted during the 2-year life of the task force resulted in arrests of one or more suspects on State or Federal charges. The task force's 34 percent arrest rate was more than double the normal 16-percent rate of arrest in all arson cases nationwide, most of which are investigated by local officials without Federal assistance. More than 80 percent of the suspects arrested in joint State-Federal church arson investigations during the life of the task Force were prosecuted in State court under State law.

Congress anticipates that the State-Federal partnerships authorized by the hate crimes act will result in an increase in the number of hate crimes solved by arrests and successful prosecutions analogous to that achieved through joint State-Federal investigations in the church arson context. Congress also anticipates that a large majority of hate crimes prosecutions will continue to be brought in State court under State law.

Congress recognizes, however, that in some circumstances the Federal Government must go beyond its usual role as the investigative partner of State and local law enforcement officials and bring Federal criminal civil rights charges. Where State and local prosecutors fail to bring appropriate State charges, or where State law or procedure is inadequate to vindicate the Federal interest in prosecuting hate crimes, it is imperative that the Federal Government be able to step in and bring effective Federal prosecutions. Unfortunately, the double-intent requirement of 18 U.S.C. 245(b)(2) has precluded the Department of Justice from performing its proper backstop role with regard to a number of heinous hate crimes.

As Deputy Attorney General Eric Holder testified before the Senate Committee on the Judiciary, the Department of Justice brought Federal hate crimes prosecutions under 18 U.S.C. 245(b)(2) in each

of the following cases. In each case, Federal prosecutors lost at trial due to the statute's "federally protected activity" requirement.

In 1994, a Federal jury in Fort Worth, TX, acquitted three white supremacists of Federal criminal civil rights charges arising from unprovoked assaults upon African-Americans, including one incident in which the defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victims of the right to participate in any "federally protected activity." The Government's proof that the defendants went out looking for African-Americans to assault was insufficient to satisfy the requirements of 18 U.S.C. 245(b)(2).

In 1982, two white men chased a man of Asian descent from a nightclub in Detroit and beat him to death. The Department of Justice prosecuted the two perpetrators under 18 U.S.C. 245(b)(2), but both were acquitted despite substantial evidence to establish their animus based on the victim's national origin. Although the Department has no direct evidence of the basis for the jurors' decision, it appears that the Government's need to prove the defendants' intent to interfere with the victim's exercise of a federally protected right—the use of a place of public accommodation—was the weak link in the prosecution.

In 1980, a notorious serial murderer and white supremacist shot and wounded an African-American civil rights leader as the civil rights leader walked from a car toward his room in a motel in Ft. Wayne, IN. The Department of Justice prosecuted the shooter under 18 U.S.C. 245(b)(2), alleging that he committed the shooting because of the victim's race and because of the victim's participation in a federally protected activity, i.e. the use of a place of public accommodation. The jury found the defendant not guilty. Several jurors later advised the press that although they were persuaded that the defendant committed the shooting because of the victim's race, they did not believe that he also did so because of the victim's use of the motel.

In each of these examples, one or more persons committed a heinous act of violence clearly motivated by the race, color, religion, or national origin of the victim. In each instance, local prosecutors failed to bring State criminal charges. Yet in each case, the extra intent requirement of 18 U.S.C. 245(b)(2)—that a hate crime be committed because of the victim's participation in one of the federally protected activities specifically enumerated in the statute—prevented the Department of Justice from vindicating the Federal interest in the punishment and deterrence of hate-based violence.

The "federally protected activity" requirement of 18 U.S.C. 245(b)(2) has led to truly bizarre results. Federal jurisdiction is likely to be upheld under this section when a racially motivated assault occurs on a public sidewalk, but not if the same incident occurs in a private parking lot across the street. Similarly, the Federal Government's jurisdiction to respond to a racially motivated attack that occurs in front of a convenience store may depend on whether or not the convenience store has a video game inside. The presence of a video game would likely qualify the store as a "place * * * of entertainment" within the meaning of 18 U.S.C. 245(b)(2)(F). Congress has determined that the Federal Govern-

ment's authority to participate in State-Federal investigative partnerships, and to step in and play a backstop role when necessary, should not hinge upon such unnecessary, anachronistic distinctions.

2. Violent hate crimes based on sexual orientation, gender, or disability

The existing Federal hate crimes law does not prohibit hate crimes committed because of bias based on the victim's actual or perceived sexual orientation, gender, or disability.

a. Sexual orientation

Statistics gathered by the Federal Government and private organizations indicate that a significant number of hate crimes based on the sexual orientation of the victim are committed every year in the United States. Specifically, data collected by the FBI pursuant to the Hate Crimes Statistics Act indicate that from 1991 through 2000—the last year for which data exists—there have been over 9,300 reported hate crimes based on sexual orientation. In 1991, the FBI reported 425 hate crimes based on sexual orientation. In 2000, that number had grown to 1,299, an increase of over 200 percent. And even these statistics may significantly understate the number of hate crimes based on sexual orientation that actually are committed in this country.

Many victims of antilesbian, antigay, and antitransgender incidents do not report the crimes to local law enforcement officials. In fact, according to Austin, TX, police Commander Gary Olfers, hate crimes are the "Number 1 under reported crime in the state." Dallas Morning News, "Hate-crimes experts say statistics don't tell story: Many cases unreported; special law rarely used", November 8, 1999. And "[d]espite under reporting, the trend in state statistics shows that gays and lesbians are increasingly the targets of crime." Id.

The Southern Poverty Law Center's Winter 2001 Intelligence Report (The Hate Crime Statistics Act: Ten Years Later, The Numbers Don't Add Up) found that "the real level of hate crimes—currently running at about 8,000 a year in FBI statistics—is probably closer to 50,000." For example, according to the Report, a study funded by the Justice Department "estimated that almost 6,000 law enforcement agencies likely experienced at least one hate crime that went unreported."

Despite the prevalence of violent hate crimes committed on the basis of sexual orientation, such crimes are not covered by 18 U.S.C. 245 unless there is some independent basis for Federal jurisdiction, such as race-based bias. Accordingly, the Federal Government has been without authority to work in partnership with local law enforcement officials, or to bring Federal prosecutions, when gay men or lesbians are the victims of murders or other violent assaults because of bias based on their sexual orientation.

The murder of Mathew Shepard in Laramie, WY, is a perfect example of the limitations in pre-existing Federal law. Despite the clear evidence that the murder of Mr. Shepard was motivated by animus based on Mr. Shepard's sexual orientation, the Federal Government lacked jurisdiction under pre-existing law to act as a full partner with State and local officials in the investigation of this

horrifying crime or, if necessary, to bring Federal hate crimes charges. As a result, according to Commander David O'Malley—the chief investigator in the Shepard murder case—"the Albany County Sheriff's office had to furlough five investigators because of soaring costs" associated with handling the case without any financial or investigatory support from the Federal Government. (Excerpts of press statement by Commander David O'Malley, September 12, 2000).

In a November 11, 1999, letter to Speaker Dennis Hastert, Sheriff James Pond and detective Sergeant Robert DeBree of the Albany County Sheriff's Department wrote: "We believe justice was served in this case [Shepard], but not without cost. We have been devastated financially, due to expenses incurred in bringing Matthew's killers to justice. For example, we had to lay off five law enforcement staff."

The situation confronting the Albany County Sheriff's office in the Shepard case stands in stark contrast to what occurred in Jasper, TX, in the James Bryd, Jr., case. Because the murder of James Byrd, Jr. was covered under the existing Federal hate crimes statute, the local law enforcement agency in Jasper received forensic assistance and nearly $300,000 from the Federal Government to help cover the costs associated with successfully prosecuting Mr. Byrd's killers.

b. Gender

Although acts of violence committed against women traditionally have been viewed as "personal attacks" rather than as hate crimes, Congress has come to understand that a significant number of women are exposed to terror, brutality, serious injury, and even death because of their gender. Indeed, Congress, through the enactment of the Violence Against Women Act (VAWA) in 1994, has recognized that some violent assaults committed against women are bias crimes rather than mere "random" attacks. The Senate Report on VAWA, which created a Federal civil cause of action for victims of gender-based hate crimes, stated:

> The Violence Against Women Act aims to consider gender-motivated bias crimes as seriously as other bias crimes. Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated. "Placing this violence in the context of the civil rights laws recognizes it for what it is—a hate crime."

Senate Report No. 103–138 (1993) (quoting testimony of Prof. Burt Neuborne).

The majority of States do not have statutes that specifically prohibit gender-based or transgender-based hate crimes. Although all 50 states have statutes prohibiting rape and other crimes typically committed against women, only 24, plus the District of Columbia, have hate crimes statutes that include gender among the categories of prohibited bias motives.

The Committee has concluded that the Federal Government should have jurisdiction, as set forth in the hate crimes act, to work together with State and local law enforcement officials in the investigation of violent gender-based and transgender-based hate crimes and, where appropriate in rare circumstances, to bring Federal prosecutions aimed at vindicating the strong Federal interest in combating the most heinous of these crimes of violence.

It is important to emphasize in this regard that the Hate Crimes Act will not result in the federalization of all rapes, other sexual assaults, or acts of domestic violence. Rather, as discussed below in greater detail, Congress has drafted the bill to ensure that the Federal Government's investigations and prosecutions of gender-based hate crimes will be strictly limited to those crimes that are motivated by gender-based animus and, thus, implicate the greatest Federal interest. The April 10, 2002, indictment of Darrell David Rice by the Justice Department for the brutal murders of Juliane Marie Williams and Laura S. Winans is a clear example of such a crime.

As is the case with other categories of hate crimes, State and local authorities will continue to prosecute virtually all gender-motivated hate crimes. One principal reason for this is that while State and local prosecutors are required to prove only that the perpetrator committed the act alleged in the indictment, Federal prosecutors will be required to prove not only that the perpetrator committed the act alleged, but also that the perpetrator was motivated by animus based on actual or perceived gender and that the crime has a nexus to interstate commerce.

c. Disability

Congress has shown a consistent and durable commitment over the past decade to the protection of persons with disabilities from discrimination based on their disabilities. Beginning with the 1988 amendments to the Fair Housing Act, and culminating with the enactment of the Americans with Disabilities Act of 1990, Congress has extended civil rights protections to persons with disabilities in many traditional civil rights contexts. Currently, 24 States plus the District of Columbia have hate crime statutes that cover disability.

Concerned about the problem of disability-based hate crimes, Congress also amended the Hate Crimes Statistics Act in 1994 to require the FBI to collect information about such hate-based incidents from State and local law enforcement agencies.

Congress has determined that the Federal interest in being able to work together with State and local officials in the investigation and prosecution of hate crimes motivated by animus based on disability is sufficiently strong to warrant amendment of 18 U.S.C. 245, as set forth in the Hate Crimes Act, to include such crimes when they result in bodily injury and when Federal prosecution is consistent with the commerce clause.

III. The Local Law Enforcement Enhancement Act of 2001

The Local Law Enforcement Enhancement Act of 2001 creates a three-tiered system for the Federal prosecution of hate crimes under 18 U.S.C. 245, as follows:

First, the bill leaves 18 U.S.C. 245(b)(2) as is. As discussed above, 18 U.S.C. 245(b)(2) prohibits the intentional interference, or

attempted interference, with a person's participation in one of six specifically enumerated "federally protected activities" on the basis of the person's race, color, religion, or national origin. No showing of bodily injury is required to prove a misdemeanor offense under this section; to prove a felony, the Government must prove either that bodily injury or death resulted or that the offense included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.

Second, the bill adds a new section to title 18 of the U.S. Code to be codified at 18 U.S.C. 249—entitled "Hate crime acts." In particular, section 249(a)(1) prohibits the intentional infliction of bodily injury on the basis of race, color, religion, or national origin. Unlike 18 U.S.C. 245(b)(2), this new provision does not require a showing that the defendant committed the offense because of the victim's participation in a federally protected activity. However, an offense under the new 18 U.S.C. 249(a)(1) will be prosecuted as a felony only, and a showing either of bodily injury or death or of an attempt to cause bodily injury or death through the use of fire, a firearm, or an explosive device is required. Other attempts will not constitute offenses under this section.

Third, the new section 18 U.S.C. 249(a)(2), prohibits the intentional infliction of bodily injury or death (or an attempt to inflict bodily injury or death through the use of fire, a firearm, or an explosive device) on the basis of religion, gender, sexual orientation, or disability. Like 18 U.S.C. 245, this provision authorizes the prosecution of felonies only and excludes most attempts, while omitting the "federally protected activity" requirement of 18 U.S.C. 245.

Unlike 18 U.S.C. 245, however, this second new provision requires proof that the defendant was motivated by hate based on the actual or perceived sexual orientation, gender, or disability of any person. In addition, this provision requires proof of a commerce clause nexus as an element of the offense. Specifically, the Government must prove:

- the conduct occurs during the course of, or as the result of, the travel of the defendant or the victim—

  (I) across a State line or national border; or

  (II) using a channel, facility, or instrumentality of interstate or foreign commerce;

- the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct;

- the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

  (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

  (II) otherwise affects interstate or foreign commerce.

- the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in activity affecting interstate or foreign commerce; or

- the offense is in or affects interstate or foreign commerce." See 18 U.S.C. 245(c)(2)(B).

Finally, for prosecutions under sections 249 (a)(1) and (a)(2), the bill requires a certification by the Attorney General (or one of a few other senior Department of Justice officials designated in the bill) that:

- (1) he or she has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, or disability of any person was a motivating factor underlying the alleged conduct of the defendant; and
- (2) he or his designee or she or her designee has consulted with State or local law enforcement officials regarding the prosecution and determined that—

  (A) the State does not have jurisdiction or does not intend to exercise jurisdiction;
  (B) the State has requested that the Federal Government assume jurisdiction;
  (C) the State does not object to the Federal Government assuming jurisdiction; or
  (D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

IV. FEDERALIZATION

As stated above, it is both the intent and the expectation of Congress that the enactment of the Hate Crimes Act will result in only a modest increase in the number of hate crimes prosecutions brought by the Federal Government. In the more than 30 years since 18 U.S.C. 245 was enacted, the Federal Government, on average, has prosecuted four hate crimes a year. Congress has carefully drafted this bill, and included limiting statutory language where necessary, to ensure that the Federal Government will continue to limit its prosecutions of hate crimes—particularly those motivated by actual or perceived animus based on gender—to the small set of cases that implicate the greatest Federal interest and present a need for Federal intervention. It is essential that all understand that it is not the intention of Congress to federalize all rapes, sexual assaults, acts of domestic violence, or other gender-based crimes.

The express language of the bill contains several important limiting principles. First, the bill requires proof that offenses in the three new categories be motivated by animus based on actual or perceived sexual orientation, gender, or disability. This statutory animus requirement, which the Government must prove beyond a reasonable doubt as an element of the offense, will limit the pool of potential Federal cases to those in which the evidence of bias motivation is sufficient to distinguish them from ordinary State law cases.

Second, the bill requires a nexus to interstate commerce for all Federal hate crimes based on sexual orientation, gender, or disability. This interstate commerce requirement, which the Government must prove beyond a reasonable doubt as an element of the

offense, will limit Federal jurisdiction in these new categories to cases that implicate Federal interests.

Third, the bill excludes misdemeanors and limits Federal hate crimes based on sexual orientation, gender, or disability to those involving bodily injury or death (and a limited set of attempts to cause bodily injury or death). These limitations will narrow the set of newly federalized cases to truly serious offenses.

Finally, while 18 U.S.C. 245 already requires a written certification by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specially designated Assistant Attorney General that "in his [or her] judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice" before any prosecution under the statute may be commenced, see 18 U.S.C. 245(a)(1), the Hate Crimes Act requires an even stricter certification for prosecutions brought under the provisions of the bill that create new Federal categories of hate crimes.

Specifically, the bill requires certification, by the Attorney General or other high-ranking Department of Justice official specified therein, that: "(1) he or she has reasonable cause to believe that the actual or perceived race, color, national origin, religion, sexual orientation, gender, or disability of any person was a substantial motivating factor underlying the defendant's conduct; and (2) that he or his designee, or she or her designee, has consulted with state or local law enforcement officials regarding the prosecution and determined that: (a) the State does not have jurisdiction or refuses to assume jurisdiction; or (b) the State has requested that the federal government assume jurisdiction; (c) the state does not object to the federal government assuming jurisdiction; or (d) actions by state and local law enforcement officials have left demonstrably unvindicated the federal interest in eradicating bias-motivated violence." 18 U.S.C. 249(b). This heightened certification requirement is intended to ensure that the Federal Government will assert its new hate crimes jurisdiction in a principled and properly limited fashion.

Congress expects the efforts of the Department of Justice under the new substantive provisions of the Hate Crimes Act to be guided by Department-wide policies that impose additional limitations on the cases prosecuted by the Federal Government. First, under the "backstop policy" that applies to all of the Federal Government's criminal civil rights investigations, the Department of Justice defers prosecution in the first instance to State and local law enforcement officials except in highly sensitive cases in which the Federal interest in prompt Federal investigation and prosecution outweighs the usual justifications of the backstop policy.

Second, under the formal policy of the Department of Justice on dual and successive prosecutions, the Department does not bring a Federal prosecution following a State prosecution arising from the same incident unless the matter involved a "substantial federal interest" that the state prosecution had left "demonstrably unvindicated."

Some opponents of the Hate Crimes Act argue that the legislation will unduly expand Federal authority and infringe on the States' discretion in prosecuting criminal conduct. This view was expressed by Senator Hatch, who asserted that the Hate Crimes

Act "strays from the foundations of our Constitutional structure—namely, the first principles of federalism that for more than two centuries have vested states with primary responsibility for prosecuting crimes committed within their boundaries."[2] Although the Committee agrees with Senator Hatch concerning the proper role of the Federal Government in prosecuting criminal conduct, the Hate Crimes Act is consistent with a long history of Federal involvement in combating criminal conduct.

Alexander Hamilton, an advocate of a strong national government, eloquently expressed the notion that law enforcement generally should be the responsibility of the State. He wrote in Federalist Number 17, "There is one transcendent advantage belonging to the province of the state governments, which alone suffices to place the matter in a clear and satisfactory light. I mean the ordinary administration of criminal and civil justice."

Today, 95 percent of all criminal prosecutions are handled at the State and local level. At the same time, a review of the Federal criminal code belies the argument that criminal law is the sole province of State and local governments. In fact, since the first Congress, the Federal Government has involved itself in the enactment and enforcement of criminal laws. The Committee believes that hate crimes legislation is just as vital to the national interest as prior criminal statutes passed by Congress—many in the past 6 years and unanimously supported by opponents of hate crimes legislation.

There are already more than 3,000 Federal crimes.[3] In fact, the First Congress in the Crimes Act of 1790[4] established 17 Federal crimes, including treason, counterfeit, perjury, and receiving stolen goods. Since then, the extent of Federal criminal law has greatly expanded into areas traditionally prosecuted by the States. For example, after the Civil War, Congress passed the Post Office Act of 1872 which forbade mailing lottery tickets and obscene materials or using the mail to defraud. The next year, the Comstock Law forbade using the mail to send obscene books, contraceptives, or an article for procuring abortion. In 1884, Congress forbade railroads and boat lines from accepting or transporting diseased livestock. Shortly thereafter, it enacted the Sherman Act.

At the turn of the century, Congress continued to expand Federal criminal law. The Mann Act[5] prohibited the transport of women across State lines for illicit purposes; the Dyer Act[6] prohibited transporting a stolen motor vehicle across State lines; and the Volstead Act[7] instituted prohibition. In the 1930's, Congress enacted the Lindbergh Act, prohibiting the transportation of a kidnaping victim across State lines;[8] the Fugitive Felon Act,[9] prohibiting interstate flight to avoid prosecution for enumerate violent felonies; the National Firearms Act,[10] regulating the sale of guns; the Na-

---

[2] Congressional Record, July 21, 1999.
[3] See Hon. Roger J. Miner, "Crime and Punishment in the Federal Courts," 43 Syracuse L. Rev. 682, 681 (1992).
[4] 1 Stat. 112.
[5] Act of June 25, 1910, ch. 395, 36 Stat. 825. The Supreme Court upheld the statute in *Hoke* v. *United States,* 227 U.S. 308 (1913).
[6] Act of Oct. 29, 1919, ch. 89, 41 Stat. 324. The Supreme Court upheld the Dyer Act in *Brooks* v. *United States,* 267 U.S. 432 (1925).
[7] Act of Oct. 28, 1919, ch. 85, 41 Stat. 305.
[8] Ch. 271, 47 Stat. 326 (1932).
[9] Ch. 302, 48 Stat. 782 (1934).
[10] Act of June 26, 1934, ch. 757, 48 Stat. 1236.

tional Stolen Property Act,[11] prohibiting the transportation of stolen property in interstate commerce; and statutes that punished robbing a national bank; [12] and extortion by telephone, telegraph or radio.[13]

Since then, Congress has passed the Omnibus Crime Control and Safe Streets Act of 1968,[14] the Organized Crime Control Act of 1970,[15] the Comprehensive Drug Prevention and Control Act of 1970,[16] the Crime Control Act of 1984,[17] the Anti-Drug Abuse Acts of 1986 [18] and 1988,[19] the Comprehensive Crime Control Act of 1990,[20] and the Violent Crime Control and Law Enforcement Act of 1994.[21]

Since 1995 alone, Congress has enacted more than 37 laws that create new Federal crimes or impose new Federal criminal penalties for conduct that is already criminal under State law. For example, in 1996, Congress, with a vote of 98–0 in the Senate, enacted the Church Arson Prevention Act.[22] In encouraging passage, Senator Frist observed:

> I truly believe that the local authorities are the best resources to investigate and solve [church arsons]. This bill does not undermine, or in any way, suggest, that the local authorities are not capable of solving these crimes. Rather, the bill helps to deal with special difficulties involved when a criminal moves from state to state and where federal assistance and a federal statute is needed to adequately resolve the problem.[23]

Likewise, in 1997, Congress unanimously passed the Criminal Use of Guns Act,[24] which increases mandatory minimum sentences for individuals who commit crimes of violence or drug trafficking when a firearm is used in the crime. In supporting the legislation, Senator Helms expressed the view that: "Fighting crime is, and must be, a prime concern in America" and that enacting the legislation "is a necessary step toward recommitting our Government and our citizens to a real honest-to-God war on crime." [25]

Two years later, in 1999, Congress unanimously enacted the Federal Law Enforcement Animal Protection Act,[26] making it a Federal offense—punishable for up to 10 years in prison—to injure a Federal law enforcement animal. That same year, it unanimously passed the Prevention of Depiction of Animal Cruelty Act,[27] banning the interstate commerce of videos depicting cruelty to animals. During the debate on the latter, Senator Smith of New Hampshire argued that "state anti-cruelty statutes are not adequate in ad-

---

[11] Ch. 333, 48 Stat. 794 (1934).
[12] Ch. 304, 48 Stat. 783 (1934).
[13] Ch. 300, 48 Stat. 781 (1934).
[14] Public Law 90–351, 82 Stat. 197 (1968).
[15] Public Law 91–452, 84 Stat. 922 (1970).
[16] Public Law 91–513, 84 Stat. 1236 (1970).
[17] Public Law 98–473, 98 Stat. 1837 (1984).
[18] Public Law 99–570, 100 Stat. 3207 (1986).
[19] Public Law 100–690, 102 Stat. 4181 (1988).
[20] Public Law 101–647, 104 Stat. 4789 (1990).
[21] Public Law 103–322, 108 Stat. 1796 (1994).
[22] Public Law 104–155.
[23] Congressional Record, July 8, 1996.
[24] Public Law 105–386.
[25] Congressional Record, Jan. 21, 1997.
[26] Public Law 106–254.
[27] Public Law 106–152.

dressing this problem."[28] Likewise, Senator Kyl argued that "while the acts of animal cruelty featured in these videos may violate many state animal cruelty laws, they can be difficult to prosecute."[29]

Today, the Federal law reaches aspects of the following traditional State offenses: theft,[30] fraud,[31] extortion,[32] bribery,[33] assault,[34] domestic violence,[35] robbery,[36] murder,[37] and drug offenses.[38] Although Congress should be cautious in expanding Federal criminal statutes, the Committee believes combating a growing trend of hate-motivated violence is an important function of the Federal Government.

V. CONSTITUTIONAL BASIS

The 13th amendment broadly authorizes Congress to regulate acts of violence committed on the basis of race, color, religion, or national origin and therefore provides an ample constitutional basis for the provision of the Hate Crimes Act that addresses hate crimes falling within these categories.

The commerce clause provides Congress' strongest source of legislative authority to regulate acts of violence motivated by animus based on actual or perceived sexual orientation, gender, or disability. To avoid constitutional concerns arising from the Supreme Court's *Lopez* decision, Congress has required that the Government prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution brought under one of the newly created categories of 18 U.S.C. 249(a)(2). Congress has drafted the commerce clause element in a manner intended to reach all cases within the scope of its commerce power. Pursuant to 18 U.S.C. 249(a)(2), the Government must prove, in hate crimes prosecutions involving conduct motivated by animus based on actual or perceived sexual orientation, gender, or disability, "that (i) in connection with the offense, the defendant travel[ed] in interstate or foreign commerce, use[d] a facility or instrumentality of interstate or foreign commerce, or engage[d] in activities that affect interstate or foreign commerce; or (ii) the offense [wa]s in or affect[ed] interstate or foreign commerce."

The interstate commerce element will ensure that hate crimes prosecutions brought under the new 18 U.S.C. 249(a)(2) will not be mired in constitutional litigation concerning the scope of Congress' power under the enforcement provisions of the 13th and 14th

---

[28] Congressional Record, Nov. 19, 1999.
[29] Id.
[30] 18 U.S.C. 659 (theft from interstate shipment), 18 U.S.C. 2312, 2313 (interstate transportation of stolen motor vehicles), 18 U.S.C. 2314, 2315 (interstate transportation of stolen property).
[31] 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1343 (wire fraud), 18 U.S.C. 1344 (bank fraud).
[32] 18 U.S.C. 1951 (interference with commerce by extortion), 18 U.S.C. 891–894 (extortionate credit transaction).
[33] 18 U.S.C. 201 (bribery of Federal official), 18 U.S.C. 224 (sports bribery), 18 U.S.C. 666 (Federal program bribery), 18 U.S.C. 1952 (interstate travel in aid of bribery).
[34] 18 U.S.C. 351 (assault on federally protected persons), 18 U.S.C. 1501 (assault on process server).
[35] 18 U.S.C. 2261 (interstate domestic violence).
[36] 18 U.S.C. 1951 (interference with interstate commerce by threats of violence).
[37] 18 U.S.C. 1116 (murder of foreign officials, official guests, and internationally protected persons), 18 U.S.C. 1117 (conspiracy to commit murder), 18 U.S.C. 1120 (murder by escaped Federal prisoner), 18 U.S.C. 1958 (use of interstate commerce facilities in commission of murder-for-hire).
[38] 21 U.S.C. 841 (manufacture, distribution, and possession with the intent to distribute), 21 U.S.C. 846 (drug conspiracy), 21 U.S.C. 848 (drug kingpin).

amendments. Congress believes that the interstate commerce element contained in the bill for hate crimes based on sexual orientation, gender, or disability fully satisfies Congress' obligation to comply with the commerce clause. The interstate commerce nexus required by the bill is analogous to that required in many other Federal criminal statutes, including the Church Arson Prevention Act of 1996, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). Prosecutions brought under these statutes have not raised problematic constitutional litigation over the interpretation of their respective commerce clause elements.

Indeed, the Church Arson Prevention Act of 1996 provides a strong precedent for the structure of the Hate Crimes Act. Congress passed the Church Arson Prevention Act after discovering that then-existing Federal laws pertaining to church arson cases contained unnecessarily onerous jurisdictional requirements. Consistent with its constitutional authority, Congress amended the church arson statute, 18 U.S.C. 247, to limit to church arson cases involving religious motivation its requirement that a nexus to interstate commerce be proved. Analogous to the structure set forth in the Hate Crimes Act, the Church Arson Prevention Act does not require proof of an interstate commerce element in church arson cases involving racial or ethnic motivation. The changes in Federal law achieved through the enactment of the Church Arson Prevention Act have been largely responsible for the remarkable success of the National Church Arson Task Force, which, as described above, has worked in partnership with State and local officials to solve church arson cases at more than double the usual rate of arrest in all arson cases nationwide.

Finally, to the extent that there may be open questions regarding the precise contours of the range of circumstances under which the enforcement provision of the 13th amendment authorizes Congress to criminalize hate crimes committed on the basis of religion, Congress has included religious violence in both 18 U.S.C. 249(a)(1), which is based on Congress' enforcement powers under the 13th amendment and does not require proof of a nexus to interstate commerce, and 18 U.S.C. 249(a)(2), which is based on Congress' powers under the commerce clause and contains an interstate commerce element that must be proved by the Government beyond a reasonable doubt in each case. The inclusion of religion in both subsection (a)(1) and subsection (a)(2) will enable prosecutors to determine, based on the facts of each case before them, how best to proceed in light of possible constitutional challenges that might be brought.

a. Justice Department letter on constitutionality

The following letter, prepared by the Department of Justice in the wake of the Supreme Court's decision in *U.S.* v. *Morrison,* 120 S. Ct. 1740 (2000), discusses in greater detail the constitutionality of the Hate Crimes Act:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, DC, June 13, 2000.

The Honorable EDWARD KENNEDY,
U.S. Senate, Washington, DC.

DEAR SENATOR KENNEDY: This letter responds to your request for our views on the constitutionality of a proposed legislative amendment entitled the "Local Law Enforcement Enhancement Act of 2000." Section 7(a) of the bill would amend title 18 of the United States Code to create a new section 249, which would establish two criminal prohibitions called "hate crime acts." First, proposed section 249(a)(1) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, or an explosive or incendiary device, "because of the actual or perceived race, color, religion, or national origin of any person." Second, proposed section 249(a)(2) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, or an explosive or incendiary device, "because of the actual or perceived religion, national origin, gender, sexual orientation, or disability of any person," section 249(a)(2)(A), but only if the conduct occurs in at least one of a series of defined "circumstances" that have an explicit connection with or effect on interstate or foreign commerce, section 249(a)(2)(B).

In light of *United States* v. *Morrison,* 120 S. Ct. 1740 (2000), and other recent Supreme Court decisions, defendants might challenge the constitutionality of their convictions under section 249 on the ground that Congress lacks power to enact the proposed statute. We believe, for the reasons set forth below, that the statute would be constitutional under governing Supreme Court precedents.[39] We consider in turn the two proposed new crimes that would be created in section 249.

1. Proposed 18 U.S.C. 249(a)(1)

Congress may prohibit the first category of hate crime acts that would be proscribed—actual or attempted violence directed at persons "because of the[ir] actual or perceived race, color, religion, or national origin," section 249(a)(1)—pursuant to its power to enforce the 13th amendment to the U.S. Constitution.[40] Section 1 of that amendment provides, in relevant part, "[n]either slavery nor involuntary servitude * * *, shall exist within the United States." Section 2 provides, "Congress shall have power to enforce this article by appropriate legislation."

Under the 13th amendment, Congress has the authority not only to prevent the "actual imposition of slavery or involuntary servitude," but to ensure that none of the "badges and incidents" of slavery or involuntary servitude exists in the United States. *Griffin* v. *Breckinridge,* 403 U.S. 88, 105 (1971); see *Jones* v. *Alfred H.*

[39] Because you have asked specifically about the effect of *Morrison* on the constitutionality of the proposed bill, this letter addresses constitutional questions relating only to Congress' power to enact the proposed bill.

[40] Given our conclusion that Congress possesses authority to enact this provision under the 13th amendment, we do not address whether Congress might also possess authority under the commerce clause and the 14th amendment.

Mayer Co., 392 U.S. 409, 440–43 (1968) (discussing Congress' power to eliminate the "badges," "incidents," and "relic[s]" of slavery). "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Griffin,* 403 U.S. at 105 (quoting *Jones,* 392 U.S. at 440); see also *Civil Rights Cases,* 109 U.S. 3, 21 (1883) ("Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents"). In so legislating, Congress may impose liability not only for State action, but for "varieties of private conduct," as well. *Griffin,* 403 U.S. at 105.

Section 2(10) of the bill's findings provides, in relevant part, that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," and that "[s]lavery and involuntary servitude were enforced * * * through widespread public and private violence directed at persons because of their race." So long as Congress may rationally reach such determinations—and we believe Congress plainly could [41]—the prohibition of racially motivated violence would be a permissible exercise of Congress' broad authority to enforce the 13th amendment.

That the bill would prohibit violence against not only African Americans but also persons of other races does not alter our conclusion. While it is true that the institution of slavery in the United States, the abolition of which was the primary impetus for the 13th amendment, primarily involved the subjugation of African Americans, it is well-established by Supreme Court precedent that Congress' authority to abolish the badges and incidents of slavery extends "to legislat[ion] in regard to 'every race and individual.'" *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U.S. 273, 288 n.18 (1976) (quoting *Hodges* v. *United States,* 203 U.S. 1, 16–17 (1906).

The question whether Congress may prohibit violence against persons because of their actual or perceived religion or national origin is more complex, but there is a substantial basis to conclude that the 13th amendment grants Congress that authority, at a minimum, with respect to some religions and national origins. In *Saint Francis College* v. *Al-Khazraii,* 481 U.S. 604, 613 (1987), the Court held that the prohibition of discrimination in 1981 extends to discrimination against Arabs, as Congress intended to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Similarly, the Court in *Shaare Tefila Congregation* v. *Cobb,* 481 U.S. 615, 617–18 (1987), held that Jews can state a claim under 42 U.S.C. 1982, another Reconstruction-era antidiscrimination statute enacted pursuant to, and contemporaneously with, the 13th amendment. In construing the reach of these two Reconstruction-era statutes, the Supreme Court found that Congress intended those statutes to extend to groups like "Arabs" and "Jews" because

[41] See, e.g., *Patterson* v. *McLean Credit Union,* 491 U.S. 183 (1989); *Jones,* 392 U.S. at 441 n.78; *Hodges* v. *United States,* 203 U.S. 1, 3435 (1906) (Harlan, J., dissenting), and citing *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 441 n.78 (1968). In *McDonald,* for example, the Supreme Court held that 42 U.S.C. 1981, a Reconstruction-era statute that was enacted pursuant to, and contemporaneously with, the 13th amendment, prohibits racial discrimination in the making and enforcement of contracts against all persons, including whites. See *McDonald,* 427 U.S. at 28696.

those groups "were among the peoples [at the time the statutes were adopted] considered to be distinct races." Id; see also *Saint Francis College,* 481 U.S. at 610–13. We thus believe that Congress would have authority under the 13th amendment to extend the prohibitions of proposed section 249(a)(1) to violence that is based on a victim's religion or national origin, at least to the extent the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the 13th amendment.[42]

None of the Court's recent federalism decisions casts doubt on Congress' powers under the 13th amendment to eliminate the badges and incidents of slavery. Both *Boeme* v. *Flores,* 521 U.S. 507 (1997), and *United States* v. *Morrison,* 120 S. Ct. 1740 (2000), involved legislation that was found to exceed Congress' powers under the 14th amendment. The Court in *Morrison,* for example, found that Congress lacked the power to enact the civil remedy of the Violence Against Women Act ("VAWA"), 42 U.S.C. 13981, pursuant to the 14th amendment because that amendment's equal protection guarantee extends only to "state action," and the private remedy there was not, in the Court's view, sufficiently directed at such "state action." 120 S. Ct. at 1756, 1758. The 13th amendment, however, plainly reaches private conduct as well as Government conduct, and Congress thus is authorized to prohibit private action that constitutes a badge, incident or relic of slavery. See *Griffin,* 403 U.S. at 105; *Jones,* 392 U.S. at 440–43. Enactment of the proposed section 249(a)(1) therefore would be within Congress' 13th amendment power.

2. Proposed 18 U.S.C. 249(a)(2)

Congress may prohibit the second category of hate crime acts that would be proscribed certain instances of actual or attempted violence directed at persons "because of the[ir] actual or perceived religion, national origin, gender, sexual orientation, or disability," section 249(a)(1)(A)—pursuant to its power under the commerce clause of the Constitution, art. I., section 8, cl. 3.

The Court in *Morrison* emphasized that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." 120 S. Ct. at 1748; see also *United States* v. *Lopez,* 514 U.S. 549, 557–61 (1995). Consistent with the Court's emphasis, the prohibitions of proposed section 249(a)(2) (in contrast to the provisions of proposed section 249(a)(1), discussed above), would not apply except where there is an explicit and discrete connection between the proscribed conduct and interstate or foreign commerce, a connection that the Government would be required to allege and prove in each case.

In *Lopez,* the Court considered Congress' power to enact a statute prohibiting the possession of firearms within 1,000 feet of a school. Conviction for a violation of that statute required no proof of a jurisdictional nexus between the gun, or the gun possession, and interstate commerce. The statute included no findings from which the Court could find that the possession of guns near schools substantially affected interstate commerce and, in the Court's view,

[42] In light of the Court's construction of 1981 and 1982 in *Shaare Tefila Congregation* and *St. Francis College,* it would be consistent for the Court so to construe this legislation, especially with sufficient guidance from Congress.

the possession of a gun was not an economic activity itself. Under these circumstances, the Court held that the statute exceeded Congress' power to regulate interstate commerce because the prohibited conduct could not be said to "substantially affect" interstate commerce. Proposed section 249(a)(2), by contrast to the statute invalidated in *Lopez,* would require pleading and proof of a specific jurisdictional nexus to interstate commerce for each and every offense.

In *Morrison,* the Court applied its holding in *Lopez* to find unconstitutional the civil remedy provided in VAWA, 42 U.S.C. 13981. Like the prohibition of gun possession in the statute at issue in *Lopez,* the VAWA civil remedy required no pleading or proof of a connection between the specific conduct prohibited by the statute and interstate commerce. Although the VAWA statute was supported by extensive congressional findings of the relationship between violence against women and the national economy, the Court was troubled that accepting this as a basis for legislation under the commerce clause would permit Congress to regulate anything, thus obliterating the "distinction between what is truly national and what is truly local." *Morrison,* 120 5. Ct. at 1754 (citing *Lopez,* 514 U.S. at 568). By contrast, the requirement in proposed section 249(a)(2) of proof in each case of a specific nexus between interstate commerce and the proscribed conduct would ensure that only conduct that falls within the commerce power, and thus is "truly national," would be within the reach of that statutory provision.

The Court in *Morrison* emphasized, as it did in *Lopez,* 514 U.S. at 561–62, that the statute the Court was invalidating did not include an "express jurisdictional element," 120 5. Ct. at 1751, and compared this unfavorably to the criminal provision of VAWA, 18 U.S.C. 2261(a)(1), which does include such a jurisdictional nexus. See id. at 1752 n.5. The Court indicated that the presence of such a jurisdictional nexus would go far toward meeting its constitutional concerns:

> The second consideration that we found important in analyzing [the statute in *Lopez*] was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." [514 U.S.] at 562. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

Id. at 1750–51; see also id. at 1751–52 ("Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that [the provision at issue in *Morrison*] is sufficiently tied to interstate commerce, Congress elected to cast [the provision's] remedy over a wider, and more purely intrastate, body of violent crime.").

While the Court in *Morrison* stated that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," id. at 1754, the proposed regulation of violent conduct in section 249(a)(2) would not be based "solely on that conduct's aggregate effect on interstate commerce," but would instead be based on a specific and discrete connection between each instance of prohibited conduct and inter-

state or foreign commerce. Specifically, with respect to violence because of the actual or perceived religion, national origin, gender, sexual orientation, or disability of the victim, proposed section 249(a)(2) would require the Government to prove one or more specific jurisdictional commerce "elements" beyond a reasonable doubt. This additional jurisdictional requirement would reflect Congress' intent that section 249(a)(2) reach only a "discrete set of [violent acts] that additionally have an explicit connection with or effect on interstate commerce," 120 S. Ct. at 1751 (quoting *Lopez,* 514 U.S. at 562), and would fundamentally distinguish this statute from those that the Court invalidated in *Lopez* and in *Morrison.*[43] Absent such a jurisdictional element, there exists the risk that "a few random instances of interstate effects could be used to justify regulation of a multitude of intrastate transactions with no interstate effects." *United States* v. *Harrington,* 108 F.3d 1460, 1467 (D.C. Cir. 1997). By contrast, in the context of a statute with an interstate jurisdictional element (such as in proposed section 249(a)(2)(B)), "each case stands alone on its evidence that a concrete and specific effect does exist." Id.[44]

The jurisdictional elements in section 249(a)(2)(B) would ensure that each conviction under section 249(a)(2) would involve conduct that Congress has the power to regulate under the commerce clause. In *Morrison,* the Court reiterated its observation in *Lopez* that there are "three broad categories of activity that Congress may regulate under its commerce power." 120 S. Ct. at 1749 (quoting *Lopez,* 514 U.S. at 558):

> First, Congress may regulate the use of the channels of interstate commerce * * *. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities * * *. Finally, Congress' commerce authority includes the power to regulate those activities having a sub-

---

[43] See also *Morrison,* 120 S. Ct. at 1775 (Breyer, J., dissenting) ("the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite—for example, that some item relevant to the federally regulated activity has at some time crossed a state line"). Of course, our reliance on the jurisdictional nexus in sec. 249(a)(2) is not intended to suggest that such a jurisdictional nexus is always necessary to sustain commerce clause legislation.

[44] That a jurisdictional element makes a material difference for constitutional purposes is demonstrated by the *Lopez* Court's citation to the jurisdictional element in the statute at issue in *United States* v. *Bass,* 404 U.S. 336 (1971), as an example of a provision that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. The *Lopez* Court wrote:

> For example, in *United States* v. *Bass,* 404 U.S. 336 (1971), the Court interpreted former 18 U.S.C. §1202(a), which made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce * * * any firearm." 404 U.S., at 337. The Court interpreted the possession component of §1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Id., at 349.

514 U.S. at 561–62. In *Bass* itself, the Government argued that the statute in question should be construed not to require proof that the gun possession was in, or affected, interstate commerce. The Court responded that the Government's proposed "broad construction" would "render[] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." 404 U.S. at 350. The Court accordingly construed the statute to require "proof of some interstate commerce nexus in each case," so that the statute would not "dramatically intrude[] upon traditional state criminal jurisdiction" id., in the way it would if there were no requirement of proof in each case of the nexus to interstate commerce.

> stantial relation to interstate commerce, * * * i.e., those activities that substantially affect interstate commerce.

Id. (quoting *Lopez,* 514 U.S. at 55859).

Proposed section 249(a)(2)(B)(i) would prohibit the violent conduct described in section 249(a)(2)(A) where the Government proves that the conduct "occurs in the course of, or as the result of, the travel of the defendant or the victim (a) across state lines or national borders, or (b) using a channel, facility, or instrumentality of interstate or foreign commerce." A conviction based on such proof would be within Congress' powers to "regulate the use of the channels of interstate commerce," and to "regulate and protect * * *, persons or things in interstate commerce." Proposed section 249(a)(2)(B)(ii) would prohibit the violent conduct described in section 249(a)(2)(A) where the Government proves that the defendant "uses a channel, facility or instrumentality of interstate or foreign commerce in connection with the conduct"—such as by sending a bomb to the victim via common carrier—and would fall within the power of Congress to "regulate the use of the channels of interstate commerce" and "to regulate and protect the instrumentalities of interstate commerce."[45]

Proposed section 249(a)(2)(B)(iii) would prohibit the violent conduct described in section 249(a)(2)(A) where the Government proves that the defendant "employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce in connection with the conduct."[46] Such a provision addresses harms that are, in a constitutionally important sense, facilitated by the unencumbered movement of weapons across State and national borders, and is similar to several other Federal statutes in which Congress has prohibited persons from using or possessing weapons and other articles that have at one time or another traveled in interstate or foreign commerce.[47] The courts of appeals uniformly have upheld the constitutionality of such stat-

---

[45] Such prohibitions are not uncommon in the Federal criminal code. See, e.g., 18 U.S.C. 23 1(a)(2) (1994) (prohibiting the transport in commerce of any firearm, explosive, or incendiary device, knowing or having reason to know, or intending, that it will be used unlawfully in furtherance of a civil disorder); 18 U.S.C. 875 (1994) (prohibiting the transmission in interstate or foreign commerce of certain categories of threats and ransom demands); 18 U.S.C. 1201(a)(1) (Supp. IV 1998) (prohibiting the willful transportation in interstate or foreign commerce of a kidnaping victim); 18 U.S.C. 1462 (1994 & Supp. 111996) (prohibiting the transmission of obscene materials via common carrier); 18 U.S.C. 1952 (1994) (prohibiting travel in interstate or foreign commerce, or the use of "any facility in interstate or foreign commerce," with the intent to commit or facilitate certain unlawful activities).

[46] We understand that this subsection would sanction the conduct described in subparagraph (A) where, in connection with that conduct, the defendant employs a firearm, an explosive or incendiary device, or another weapon, that has traveled in interstate or foreign commerce.

[47] For example:

> It is unlawful for convicted felons to receive any firearm or ammunition (18 U.S.C. 922(g) (1994 & Supp. 1999)), or to receive or possess any explosive (18 U.S.C. 842(i) (1994)), "which has been shipped or transported in interstate or foreign commerce."
>
> A statute enacted as a response to *Lopez* makes it unlawful (with certain exceptions) for any individual knowingly to possess or discharge a firearm "that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows * * * is a school zone." 18 U.S.C. 922(q) (2)(3) (1994 & Supp. 1999).
>
> It is unlawful, with the intent to cause death or serious bodily harm, to engage in certain so-called carjackings of motor vehicles that "ha[ve] been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C. 2119 (West 2000).
>
> It is unlawful knowingly to possess matters containing any visual depiction that "involves the use of a minor engaging in sexually explicit conduct" that "has been mailed, or has been shipped or transported in interstate of foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer." 18 U.S.C. 2252(a)(4)(B) (West Supp. 2000).

utes.[48] And, in *Lopez* itself, the Supreme Court cited to the jurisdictional element in the statute at issue in *United States* v. *Bass,* 404 U.S. 336 (1971), as an example of a provision that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. In *Bass,* 404 U.S. at 350–51, and in *Scarborough* v. *United States,* 431 U.S. 563 (1977), the Court construed that statutory element to permit conviction upon proof that a felon had received or possessed a firearm that had at some time passed in interstate commerce.

Proposed section 249(a)(2)(B)(iv)(I) would apply only where the Government proves that the violent conduct "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct." This is one specific manner in which the violent conduct can affect interstate or foreign commerce.[49] This jurisdictional element also is an exercise of Congress' power to regulate "persons or things in interstate commerce." *Morrison,* 120 5. Ct. at 1749 (quoting *Lopez,* 514 U.S. at 558). As Justice Kennedy (joined by Justice O'Connor) wrote in *Lopez,* 514 U.S. at 574, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."[50]

Finally, proposed section 249(a)(2)(B)(iv)(II) would prohibit the violent conduct described in section 249(a)(2)(A) where the Government proves that the conduct "otherwise affects interstate or foreign commerce." Such "affects commerce" language has long been regarded as the appropriate means for Congress to invoke the full extent of its authority. See, e.g., *Jones* v. *United States,* 120 5. Ct. 1904 (2000), No. 99–5739, slip op. at 5 (May 22, 2000) ("the statutory term 'affecting * * * commerce,' * * * when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause"); *Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U.S. 265, 273 (1995) ("Th[e] phrase—'affecting commerce'—normally signals Congress' intent to exercise its Commerce Clause powers to the full.").[51] Of course, that this element goes to the extent of Con-

---

[48] See, e.g., *United States* v. *Folen,* 84 F.3d 1103, 1104 (8th Cir. 1996) (sec. 842(i)); *Fraternal Order of Police* v. *United States,* 173 F.3d 898, 90708 & n.2 (D.C. Cir.), and cases cited therein (sec. 922(g)), cert. denied, 120 S. Ct. 324 (1999); *Gillespie* v. *City of Indianapolis* 185 F.3d 693, 704–06 (7th Cir. 1999), and cases cited therein (same), cert. denied, 120 5. Ct. 934 (2000); *United States* v. *Bostic,* 168 F.3d 718, 723–24 (4th Cir.), denied 527 U.S. 1029 (1999) (same); *United States* v. *Danks,* 187 F.3d 643 (8th Cir. 1999) (per curiam) (table), 1999 WL 6 15445 at * 1*2 (sec. 922(q)), cert. denied, 120 5. Ct. 823 (2000); *United States* v. *Cobb,* 144 F.3d 319, 32022 (4th Cir. 1998), and cases cited therein (sec. 2119); *United States* v. *Bausch,* 140 F.3d 739, 741 (8th Cir. 1998) (sec. 2252(a)(4)(B)), denied 525 U.S. 1072 (1999); *United States* v. *Robinson,* 137 F.3d 652, 65556 (1st Cir. 1998) (same).

[49] See, e.g., *United States* v. *Nguyen,* 155 F.3d 1219, 122425 (10th Cir. 1998), cert. denied 525 U.S. 1167 (1999); see also, e.g., *United States* v. *Thomas,* 159 F.3d 296, 297–98 (7th Cir. 1998), cert. denied, 527 U.S. 1023 (1999).

[50] In this regard, it is worth noting that at least eight Justices in *Morrison* and in *Lopez* indicated that Congress can take a broad view as to what constitutes "commercial" or "economic" activity. See *Morrison,* 120 S. Ct. at 1750 (listing, as examples of "congressional Acts regulating intrastate economic activity," the statutes at issue in *Wickard* v. *Filburn,* 317 U.S. 111 (1942) (restricting the intrastate growing of wheat on a farm for personal home consumption); and Perez v. *United States,* 402 U.S. 146 (1971) (prohibiting intrastate loansharking); id. at 1750 n.4 (describing the statute in *Wickard* as "regulat[ing] activity * * * of an apparent commercial character"); id. at 1765 (Souter, J., dissenting); see also *Lopez,* 514 U.S. at 560–61; id. at 573 (Kennedy, J., dissenting); id. at 628–30 (Breyer, J., dissenting).

[51] Such a jurisdictional element is found in many Federal statutes, including criminal provisions that prohibit violent conduct or conduct that facilitates violence. See, e.g.:

> 18 U.S.C. 231(a)(1) (1994) (prohibiting the teaching or demonstration of the use or making of firearms, explosives, or incendiary devices, or of techniques capable of causing injury or death, knowing or having reason to know or intending that the teaching or demonstration will be unlawfully employed in, or in furtherance of, a civil disorder

gress' constitutional power does not mean that it is unlimited. Interpretation of the "affecting * * * commerce" provision would be addressed on a case-by-case basis, within the limits established by the Court's doctrine. There likely will be cases where there is some question whether a particular type or quantum of proof is adequate to show the "explicit" and "concrete" effect on interstate and foreign commerce that the element requires. See *Harrington,* 108 F.3d at 1464, 1467 (citing *Lopez,* 514 U.S. at 562, 567). But on its face this element is, by its nature, within Congress' commerce clause power.[52]

In sum, because section 249(a)(2) would prohibit violent conduct in a "discrete set" of cases, 120 S. Ct. at 1751 (quoting *Lopez,* 514 U.S. at 562), where that conduct has an "explicit connection with or effect on" interstate or foreign commerce, id., it would satisfy the constitutional standards articulated in the Court's recent decisions.[53]

The Office of Management and Budget has advised that there is no objection from the standpoint of the administration's program to the presentation of this letter.

Sincerely,

ROBERT RABEN,
Assistant Attorney General.

"which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce");

18 U.S.C.A. 247 (a)(b) (West 2000) (prohibiting the intentional defacement, damaging or destruction of religious real property because of the religious character of that property, and the intentional obstruction by force or threat of force of any person in the enjoyment of that person's free exercise of religious beliefs, where "the offense is in or affects interstate or foreign commerce");

18 U.S.C.A. 2332(a)(2) (West Supp. 2000) (prohibiting the use, without lawful authority, of a weapon of mass destruction, including any biological agent, toxin, or vector, where the results of such "affect interstate or foreign commerce").

[52] See *United States* v. *Green,* 350 U.S. 415, 420 21 (1956) (upholding constitutionality of Hobbs Act, 18 U.S.C. 1951(a) (1994)—which prohibits robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"—because "racketeering affecting interstate commerce [is] within federal legislative control"); see also *United States* v. *Valenzeno,* 123 F.3d 365, 36768 (6th Cir. 1997) (affirming that *Lopez* did not affect constitutionality of Hobbs Act); *United States* v. *Robinson,* 119 F.3d 1205, 121214 (5th Cir. 1997) (same), cert. denied, 522 U.S. 1139 (1998).

[53] Any argument that *Morrison* sub silentio implies that Congress lacks any power whatever under the commerce clause to regulate violent crime (or that Congress may do so only where each violation by itself "substantially affect" interstate or foreign commerce), is unwarranted. For reasons explained above, the presence of a jurisdictional element materially distinguishes a statute such as proposed sec. 249(a)(2) from the statutes at issue in *Lopez* and in *Morrison.* The Court in *Morrison* explained that such an element helps to ensure that the statute will reach only "a discrete set" of offenses, and will not extend to conduct that lacks an "explicit connection with or effect on interstate commerce." 120 Ct. at 1751 (quoting *Lopez,* 514 U.S. at 562). What is more, the findings in sections 2 (6)(9) of the draft bill would, if adopted by Congress, reflect Congress' conclusion that the bill's proposed sec. 249(a)(2) is appropriate legislation under each of the three commerce clause "categories" identified in *Lopez* and in *Morrison.* Section 2(6) would find that the violence in question "substantially affects interstate commerce in many ways, including—(A) by impeding the movement of members of targeted groups and forcing such members to move across State lines to escape the incidence or risk of such violence; and (B) by preventing members of targeted groups from purchasing goods and services, obtaining or sustaining employment or participating in other commercial activity." Sections 2 (7)(9) would find that perpetrators "cross State lines to commit such violence," use the channels, facilities and instrumentalities of interstate commerce to commit such violence, and use articles that have traveled in interstate commerce to commit such crimes. While such findings might not in and of themselves be "sufficient" to justify Congress' assertion of its commerce clause authority, see *Morrison,* 120 5. Ct. at 1752, nevertheless they would provide important support for Congress' authority under the commerce clause to enact the draft hate-crimes bill's proposed 249(a)(2), see 120 S. Ct. at 1751 (citing *Lopez,* 514 U.S. at 563).

VI. NOT ALL CRIMES ARE HATE CRIMES

Opponents of the hate crimes bill often argue that "any crime of violence is a hate crime,[54] and that the motives behind and harms caused by a hate crime are not relevant or distinguishable from other crimes. This view, however, is not supported by history or Supreme Court precedent. Not all crimes are created equal, and mental states—not just acts—have always been an important factor in determining the severity of a crime.

Today, motive permeates the criminal law in two contexts: as proof of an element of an offense and in sentencing. As an example of the former, under Federal law, the "unlawful killing of a human being" constitutes manslaughter.[55] But if the same killing is done "with malice aforethought," the crime is murder and a more severe punishment can be levied.[56] Proof that the perpetrator intentionally selected the victim and thus premeditated the crime suffices to show the additional element necessary to establish murder. An additional example of where motive is relevant is the crime of burglary. If one simply enters a building, he or she is guilty of trespass, a misdemeanor.[57] However, if one enters the building with the motive of committing a felony (e.g. larceny) inside, he or she is guilty of burglary, a felony.[58]

As the Supreme Court recognized in *Payne* v. *Tennessee,* 501 U.S. 808, 819–20 (1991):

> The assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. * * * Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion.
>
> [I]n evaluating the gravity of the offense, it is appropriate to consider "the harm caused or threatened to the victim or society," based on such things as the degree of violence involved in the crime and "the absolute magnitude of the crime," and "the culpability of the offender," including the degree of requisite intent and the offender's motive in committing the crime.

(quoting *Solem* v. *Helm,* 463 U.S. 277, 292–94 (1983).

Recognizing these notions, it is well established that a legislature can properly determine that crimes committed against certain classes of individuals are different or warrant a stiffer response. See, e.g., 18 U.S.C. 2251 (criminal penalties for sexual exploitation of children); 18 U.S.C. 1751 (criminal penalties for assassination, kidnaping, or assault of the President or Presidential staff.) In fact, the most extreme example is the Federal law against genocide. That law applies to anyone who targets "a national, ethnic, racial, or religious group" for certain acts of criminal violence "with the

---

[54] Statement of Senator Inhofe, Congressional Record, June 21, 2000.
[55] 18 U.S.C. 1112.
[56] 18 U.S.C. 1111.
[57] See, e.g., N.Y. Penal Law §140.10.
[58] See, e.g., N.Y. Penal Law §140.20.

specific intent to destroy [that group] in whole or in substantial part." 18 U.S.C. 1091(a).

In fact, several States that lack hate crimes statutes have laws on their books that treat crimes differently based upon whether the victim belongs to a particular class. For example, in Arkansas, it is considered more serious to injure a child, a senior citizen, or a pregnant woman than another individual. See, A.C.A. §513201. That is also true if one injures a policeman, a teacher, or a doctor. See, A.C.A. §513202. One can even receive an enhanced sentence for physically abusing a high school football referee. See, A.C.A §513209. Likewise, in Indiana, it is considered more serious to commit a battery against a law enforcement officer, an employee of a penal facility or a firefighter than other individuals. Similarly, it is considered a felony to cause injury to a child, a disabled individual, a health care professional, school personnel, or a health care provider. But, it is only a misdemeanor if one causes injury to anyone else not included in the above mentioned classes. See I.C. §354221. In New Mexico, pregnant women and school personnel are singled out as classes of people for which an individual can receive an enhanced sentence. See NM §3037, §3039. Finally, in South Carolina it is considered more serious to injure school personnel, correctional facility employees, emergency service providers, firefighters, and home health care workers. See SC St §16312, §163630, §163635. As these statutes show, it is quite appropriate for a legislature to determine that certain crimes, because of the nature of harm caused or the status of the victim, are more serious than parallel offenses.

This Committee believes that hate crimes are different than other crimes and often cause unique harms. As Senator Hatch stated, "[l]et me state unequivocally that as much as we condemn all crime, hate crime can be more sinister than non-hate crime. A crime committed not just to harm an individual but out of motive of sending a message of hatred to an entire community, oftentimes a community defined on the basis of immutable traits, is appropriately punished more harshly or in a different manner than other crimes."[59] Senator Hatch is not alone in articulating this view.

In fact, the Supreme Court has stated that "the true measure of crimes is the injury done to society." *Payne,* 111 S. Ct. 2597, 2605 (1991). And, the Court has specifically stated that, with regard to the State's interests in "[ensuring] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such members to live in peace where they wish, we do not doubt that these interests are compelling." *R.A.V.,* 112 S. Ct. at 2549.

With specific regard to hate crime legislation, in *Wisconsin* v. *Mitchell,* the Court unanimously recognized that bias-inspired conduct inflicts greater individual and societal harm. The Court adopted the position articulated in several amici that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." 508 U.S. 476, 487.

Moreover, the impact of bias motivated crimes on the larger community is grave. As Justice Stevens notes in his concurring opinion in *R.A.V.,* 505 U.S. at 377:

---

[59] Judiciary Committee hearing on Combating Hate Crimes, May 11, 1999.

One need look no further than the recent social unrest in the Nation's cities to see that race-based threats cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order.

VII. Examples of Violent Hate Crimes Not Covered by Existing Law

December 1993, Humboldt, NE

On Christmas Day in 1993, Brandon Teena, 21, was raped and beaten by two male "friends" who discovered that Brandon, who had been living as a male, was anatomically female. Teena, born Teena Brandon, was anticipating undergoing gender reassignment surgery. The men threatened to kill Teena if he went to the authorities to report the rape. Despite these threats, Teena reported the crime to the police. Even so, the county sheriff, who referred to Teena as "it," did not allow his deputies to arrest the two men. Five days later the two men sought out Teena and shot and stabbed him to death. His mother later filed a civil suit against the county in which the court found that the county was partially responsible for Teena's death because the two men were not arrested after the report of the rape. The court characterized the sheriff's behavior as "extreme and outrageous."

January 1999, Port Monmouth, NJ

E.K. a mentally disabled man was kidnapped by a group of nine men and women and was tortured for 3 hours, then dumped somewhere with a pillowcase over his head. While captive, he was taped to a chair, his head was shaved, his clothing was cut to shreds, and he was punched, whipped with a string of beads, beaten with a toilet brush, and, possibly, sexually assaulted. Prosecutors believe the attack was motivated by disability bias.

February 15, 1999, Yosemite National Park, CA

A man bound, gagged, and eventually killed a woman, her daughter, and a young woman friend in the women's hotel room just outside Yosemite National Park in Northern California. The bodies of the mother and the young friend were found a month later in the trunk of their car, so badly burned that the cause of death was difficult to establish. The daughter's body was found nearby, her throat slashed so deeply she was nearly decapitated. According to the murderer, he sexually assaulted her for hours before killing her. A few months later the same man struck in Yosemite again, attacking a young woman in her home. After an intense struggle the man decapitated the young woman and dumped her body in a stream behind the home. He has since confessed to all the murders, explaining that he has fantasized about killing women for the last 30 year. He did not know any of his victims; he admittedly targeted them simply because they were women.

January 2000, Boston, MA

A group of high school teenagers sexually assaulted and attacked a 16-year-old Boston High School student on the subway because she was holding hands with another young girl, a common custom in their native African country. Thinking the victim was a lesbian, the group began groping the girl, ripping her clothes and pointing at their own genitals, while shouting "Do you like this? Do you like this? Is this what you like?" When the girl resisted, according to officials, one of the teenagers allegedly pulled a knife on the girl, held it to her throat and threatened to slash her if she didn't obey her attackers. The girl passed out from being beaten.

May 2000, Salt Lake City, UT

A 19-year-old woman working for the Southern Utah Wilderness Alliance in Salt Lake City was beaten and robbed because her attackers presumed she was a lesbian. The woman was canvassing when a male attacker in his 20's, one of two white men with shaved heads, came running up behind her, punched her in the face, knocking her down. The women said the suspect then kicked her in the face while he yelled "dyke" and "queer." Initially, police response was slow, and the incident was not being treated as a hate crime. After pressure from local activists, police have said they are investigating the case as a potential hate crime.

June 2000, New York, NY

Amanda Milan, a 27-year-old transgender woman died after her throat was slashed with a knife outside of the Port Authority in New York City. Witnesses say that a group of cab drivers cheered, applauded and shouted transgenderphobic remarks as the crime was committed. One of the perpetrators allegedly shouted phrases like "You're a man!" and "I know that's a dick between your legs."

February 11, 2001, Rifle, CO

Kyle Skyock, a slightly built 16-year-old, was found unconscious by a jogger on the side of the road after being beaten by four teenage boys because they thought he was gay, he said. Skyock's injuries included: large purple bruises on the front and back of his head; a fractured skull; a circle of burn blisters on his shoulder; a black eye; three broken ribs; a foot-shaped bruise on his stomach; another bruise described by doctors as in the shape of a two-by-four. Skyock claims to have left a party with the four boys in a four-wheel-drive vehicle. Eventually, the car stopped, Skyock said, and he was pulled from the vehicle and thrown to the ground, and the boys started kicking him. They picked him up, ramming his head into the tailgate. They threw him back in the vehicle and punched him some more. They pulled him out and kicked him again. "Faggot," "I want a turn with the bat! Give it to me. It's my turn, it's my turn," he said he heard. Police initially have said they believe that Skyock was drunk, and his injuries were a result of falling down. Skyock's family has been critical of how the police have handled the case and have said that after the incident one of the alleged perpetrators reportedly bragged on the school bus that he had beaten up a "fag." After 7 months, police finally interviewed Skyock after his family hired an attorney to pursue charges being filed against the alleged perpetrators. Previously, they refused to

talk to him because they said his mother insisted on having an adult present with him. As of April 2002, no charges have been filed, and the family has filed a civil case against the alleged perpetrators (Rocky Mountain News, August 27 and 30, 2001.)

May 25, 2001, Honolulu, HI

Two teens were charged with attempted murder after allegedly dousing the tents of gay campers, while people were inside, with flammable liquid and setting one on fire in Polihale State Park. Police believe the crime is a hate crime based on "insinuations and remarks" made by the suspects at the time. Victims in the attack said the perpetrators threw rocks and shouted homosexual slurs at about 20 men prior to setting the tent on fire. Two men, Eamonn Carolan, 18, and Orien Macomber, 19, were each sentenced for 5 years in prison each. (Associated Press, June 2, 2001; KITV TheHawaiiChannel.com, June 1, 2001; Kauai World, Jan. 21, 2002.)

June 6, 2001, Chicago, IL

A young Chicago man is accusing police of ignoring his pleas for help after gay-bashing incident in May that ended with his being criminally charged. Benjamin Stephens, a 21-year-old North Sider, said that he was out to dinner with a friend when three men lured him from the restaurant, beat him and called him "faggot." A stranger saw the incident and drove to the police station, where he said officers refused to help find the men who'd attacked him. Stephens said he became angry, and officers arrested him, hitting him and shoving him around. The incident comes on top of a suit filed earlier this year by a man who says he was beaten by off-duty Chicago police officers because they mistakenly thought he was gay. An Amnesty International report released earlier this year titled, "Allegations of homophobic abuse by Chicago police officers," alleges a series of antigay incidents, involving abuse and torture by Chicago police over the past few years. (Windy City Times, June 6, 2002; Chicago Tribune, Jan. 12, 2001; www.Amnesty.org, June 5, 2001.)

June 9, 2001, Washington, DC

Alexander Gray, 22, was reportedly jumped and beaten by a group of men who called him "faggot" hours before he was fatally shot by a DC police officer. Police are calling the beating a probable hate crime and have identified several suspects. Emergency medical technicians (EMT) and police reportedly found Gray laying on the sidewalk, crying in southeast Washington in response to a call. Gray told them about the attack. Gray, who had a cut over his eye and a gash on his head, refused medical treatment and an offer to be taken to the hospital for observation. Gray was reportedly handcuffed and placed in a police car after he began cursing officers and threatened to assault several bystanders. Police drove him home, but Gray stopped by a neighbor's house after being dropped off. The neighbor called 911 after Gray began spitting up blood. EMT's responded and again examined him; again, he refused treatment and said that "all he wanted to do was to go home and lie down." He reportedly started walking home but was soon being followed by two police officers, who told him he was not dressed appro-

priately, as his pants were torn, possibly due to the assault, and his underwear was exposed. He began to jog; the officers chased him and later shot him because they said he was wielding a knife at some people who were playing dice. Witnesses say they never saw a knife. Police have launched an investigation into the shooting, and the U.S. Attorney's office has convened a grand jury to look at the shooting. (Washington Blade, June 29, July 6, Dec. 21, 2001.)

August 26, 2001, Leawood, KS

Gary D. Raynal, an openly-gay, 44-year-old man, was found dead under an apartment deck after being tortured and severely beaten by at least two people, according to police. Raynal had been sexually tortured with a metal rod, according to his sister, Sandra Sheppard, and officials familiar with the investigation. His ears had also been burned, and he might have been strangled. His sister thinks he was killed because he was gay. Police have said they have suspects in the case and are investigating the possibility that antigay bias may have played a role in the crime. (Kansas City Star, Aug. 30 and Sept. 1, 2001, Interview with Police Sergeant Scott Hansen, Sept. 6, 2001.)

September 2001, San Antonio, TX

Al Everton, 74, was attacked by a man yelling antigay epithets and hit in the head with a baseball bat as he walked his dog at 3 a.m. Everton, along with his partner, Al Thurk, reported the incident to police the next day, describing the attacker and what he was wearing in great detail and informing police that they thought it might be one of their neighbors. The neighbor had been questioning the couple about their relationship in the weeks before the attack and making antigay comments. Everton was treated and released at a local hospital. Sore and bruised from the attack and already in frail health, Everton was bedridden afterwards. His condition declined rapidly, and he died a few weeks later. According to a news report, no charges have been made; no searches done for the possible weapon; and no description of the alleged perpetrator can be found in the police report despite it being given to them. (San Antonio Current, Feb. 14, 2002.)

September 2, 2001, Athens, GA

Christopher Gregory, a 20-year-old gay man was left with facial injuries after being attacked in an antigay incident outside a gay bar. Gregory was walking with friends when group of approximately four men and three women began shouting antigay epithets at them, such as "faggot," "look at those faggots," and "[expletive]-packers." After he turned and said, "Leave us alone!" one of the men allegedly punched him in the right eye, sending him to the concrete. He did not see the punch coming and landed on his face. As the alleged perpetrators walked away, one yelled, "stupid faggot." Gregory was treated at a local hospital and reported the incident to police. He said the police were "anything but sympathetic" and were more concerned with his alcohol consumption than details about the bashing. The police filed the report as a hate crime that was alcohol related, have not interviewed witnesses and do not

have any suspects, according to new reports. (Southern Voice, Sept. 13, 2001.)

September 6, 2001, Madison, WI

Two men were arrested on the University of Wisconsin campus for their part in attempting to strangle a gay man. The Reverend Chuck Spignola brought a group to campus to talk about abortion and homosexuality. One of his followers allegedly told a gay man that his time had come to go to hell and started choking him. Spignola himself had been arrested in June 2000 in an incident where he poured gasoline on a security volunteer at a gay pride parade in Columbus, OH. The volunteer had just asked Spignola to step away from participants when he sprayed her with gas. "You're all gonna burn in hell," he yelled. He then set fire to a rainbow-colored gay pride flag, which he had done on several earlier occasions. (WISC Channel3000.com, Sept. 7, 2001; www.tolerance.org website, Sept. 7, 2001.)

October 7, 2001, Palm Springs, CA

Eric Bridge, a 22-year-old man, told police he was robbed and beaten unconscious by four men who chased him from a downtown bar after accusing him of being gay and hurling antigay slurs at him. Bridge was treated for cuts and bruises at a local medical center and released. The victim said he wasn't gay but believes he was targeted based on perception. (Washington Blade, Oct. 19, 2001.)

October 11, 2001, College Park, MD

University of Maryland campus police are investigating a violent hate crime that occurred on National Coming-Out Day. Around 1 p.m. a 22-year-old woman wearing gay-supportive pins was hanging her bicycle on her rack when a man approached her from behind and struck her on the back of her head, pushing her head into the rack and knocking her to the ground. The white male kicked her several times while she was on the ground as he hurled antilesbian epithets and expletives, according to the police. The woman, who was treated at the University health center sustained a black eye, a bruise on her nose and scratches on her legs and arms. The woman only saw the man's leg, and police have no suspects. (Prince George's Journal, Oct. 14, 2001, Washington Blade, Oct. 19, 2001.)

November 2, 2001, Cedaredge, CO

Local authorities opened the files into the investigation of the October 2000 shooting death of a gay man, Steve Ruck, 31, in response to legal pressure from a local newspaper. Authorities ruled the death as a suicide, but hazy details and unanswered questions about the incident have led local gay-rights groups to say that it might have been a hate crime. Ruck died of a gunshot wound to the head and was in the bedroom of a neighbor, Bobby Wells, when the shooting occurred. Ruck and Wells had spent the day golfing and drinking and both were intoxicated at the time of his death. Wells gave authorities numerous accounts of what happened before the shooting. Initially, he said he was not in the trailer when Ruck died. Later, he said he and Ruck were lying on the bed in the dark, and he did not see Ruck shoot himself. He also said they were sit-

ting in the bedroom when the shot occurred. He also that Ruck had at one point placed a loaded pistol to his head. Ruck's blood was splattered on Well's clothing and feet showing that he was 4 to 6 feet away from the victim at the time of the shooting. Wells said he is not gay and has no animosity toward gays. He said in one interview that he had no idea that Ruck was gay. In another he said he might have heard he was. (Denver Post, Nov. 2, 2001.)

VIII. CONCLUSION

The enactment of the Local Law Enforcement Enhancement Act of 2001 will significantly increase the ability of State and Federal law enforcement agencies to work together to solve and prevent a wide range of violent hate crimes committed because of bias based on the actual or perceived race, color, national origin, religion, sexual orientation, gender, or disability of the victim. This bill is a necessary, thoughtful, and measured response to the critical problem of hate-motivated violence facing our Nation.

IX. COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the standing Rules of the Senate, the Committee sets forth, with respect to the bill, S. 625, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 7, 2001.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 625, the Local Law Enforcement Enhancement Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for federal costs) and Shelley Finlayson (for the state and local impact).

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

S. 625—The Local Law Enhancement Act of 2001

Summary

S. 625 would establish certain hate crimes as new federal offenses and would direct the U.S. Sentencing Commission to consider increasing prison sentences for certain hate crimes involving juveniles. The bill also would authorize the appropriation of:

- $5 million for each of fiscal years 2002 and 2003 for the Department of Justice (DOJ) to make grants to state and local governments to investigate and prosecute hate crimes;

- Such sums as may be necessary for DOJ to make grants to state and local governments to combat juvenile hate crimes; and
- Such sums as may be necessary for fiscal years 2002 through 2004 for additional personnel in DOJ and the Department of the Treasury to prevent, investigate, and prosecute hate crimes.

Assuming appropriation of the authorized and estimated amounts, CBO estimates that implementing S. 625 would cost $20 million over the 2002–2006 period. This legislation could affect direct spending and receipts; therefore, pay-as-you-go procedures would apply.

S. 625 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would benefit state, local, and tribal governments. The bill would establish grant programs and authorize the Attorney General to provide assistance to combat hat crimes. Any costs incurred by these governments would be the result of complying with grant conditions and would be voluntary.

Estimated cost to the Federal Government

The estimated budgetary impact of S. 625 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

CHANGES IN SPENDING SUBJECT TO APPROPRIATION

[By fiscal year, in millions of dollars]

	2002	2003	2004	2005	2006
Estimated authorization level	10	10	(1)	0	0
Estimated outlays	2	7	7	4	0

[1] Less than 500,000.

Basis of estimate

Based on information from the Department of Justice, CBO assumes that the bill's authorization for grants to combat juvenile hate crimes would cost an additional $5 million for each of fiscal years 2002 and 2003—the same amount that the bill would authorize for grants to state and local governments to combat hate crimes. We assume that the necessary amounts will be appropriated by the start of each fiscal year and that outlays will follow the historical rates for similar grant programs.

Based on information from the U.S. Sentencing Commission, CBO expects that the new federal hate crimes established by the bill would apply to well under 50 cases annually. Thus, any increase in costs to DOJ, the Department of the Treasury, and the federal judiciary for law enforcement, court proceedings, or prison operations would be less than $500,000 annually, subject to the availability of appropriated funds.

Because those prosecuted and convicted under S. 625 could be subject to criminal fines, the federal government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and later spent.

CBO expects that any additional receipts and direct spending would be negligible because of the small number of cases involved.

Pay-as-you-go considerations

The Balanced Budget and Emergency Deficit Control Act specifies pay-as-you-go procedures for legislation affecting direct spending and receipts. These procedures would apply to S. 625 because it would affect both direct spending and receipts, but CBO estimates that the annual amount of such changes would not be significant.

Estimated impact on state, local, and tribal governments

S. 625 contains no intergovernmental mandates as defined in UMRA and would benefit state, local, and tribal governments. The bill would authorize the Attorney General to provide assistance to state and tribal governments in investigating and prosecuting hate crimes. The bill would authorize the Attorney General to award $5 million in each of fiscal years 2002 and 2003 to state, local, and tribal governments to defray up to $100,000 of the costs associated with investigating and prosecuting a hate crime. It also would authorize grants to be awarded to state and local governments with programs to combat juvenile hate crimes. Any costs incurred by state, local, or tribal governments would be the result of complying with grant conditions and would be voluntary.

Estimated impact on the private sector

S. 625 contains no private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Mark Grabowicz.
Impact on State, Local, and Tribal Governments: Shelley Finlayson.
Impact on the Private Sector: Paige Piper/Bach.
Estimate approved by: Peter H. Fontaine, *Deputy Assistant Director for Budget Analysis.*

X. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 625 will not have significant regulatory impact.

XI. MINORITY VIEW OF SENATOR HATCH

I. INTRODUCTION

Crimes motivated by hate are especially sinister because they are motivated not only by a desire to harm an individual, but also by an intent to send a message of hatred to an entire community—a community often defined on the basis of immutable traits. The brutal murders of James Byrd and Matthew Shepard, among others, remain seared into our nation's conscience because of the savagery they suffered solely because of their attackers' irrational, hateful prejudice.

Such atrocities in many instances are appropriately punished more harshly than other crimes. It is a long-standing principle of criminal justice—as reaffirmed recently by the United States Supreme Court in a unanimous decision upholding Wisconsin's sentencing enhancement for hate crimes—that the worse a criminal defendant's motive, the worse the crime. *See Wisconsin* v. *Mitchell,* 508 U.S. 476 (1993). In addition, hate crimes cause greater harm because they are more likely to provoke retaliatory crimes and community unrest, and they inflict deep, lasting, and distinct injuries—some of which never heal—on victims and their family members. In light of these concerns, the United States Sentencing Commission has established a sentencing guideline that provides for an enhanced sentence for a federal defendant whose crime was motivated by hate. *See* USSG § 3A1.1.

While states must retain their traditional, primary role in criminal law enforcement, the federal government has an obligation to play a significant role in the nation's efforts against such crimes. The melting pot of America has proved to be the most successful multi-ethnic, multi-racial, and multi-faith country in all of recorded history. Unlike other countries riven by racial, ethnic, or religious conflict, Americans of all stripes have come to respect the diversity that makes our nation so vibrant. Hate crimes, because they corrode the bonds that bind us as a nation, must be a national priority.

Properly circumscribed, Congress' role in fighting hate crimes should not be a cause for concern. During and just preceding this past generation, Congress has been the engine of progress in securing America's civil rights achievements and in driving us as a society increasingly closer to the goal of equal rights for all under the law. Congress protected Americans from employment discrimination on the basis of race, sex, color, religion, and national origin with the passage of the Civil Rights Act of 1964; Congress protected Americans from gender-based discrimination in rates of pay for equal work with the Equal Pay Act of 1963; and from age discrimination with the passage of the Age Discrimination in Employment Act of 1967; and in 1990, Congress extended protections to

the disabled with the passage of the Americans With Disabilities Act. Most recently, in 1996, Congress passed the Church Arson Protection Act which, among other things, criminalized the destruction of any church, synagogue, mosque, or other place of religious worship because of the race, color, or ethnic characteristics of an individual associated with that property.

Yet, despite our best efforts, discrimination against people's own security—that most fundamental right to be free from physical harm—continues to persist in many forms in this country, but most sadly in the rudimentary and malicious form of violence against individuals because of their identities.

Thus, the battle against hate crimes is and must be America's fight. And despite the often contentious partisan rhetoric surrounding the issue of federal hate crimes legislation, there exists widespread agreement on these fundamental points: hate crimes are insidiously harmful, they should be vigorously prosecuted, and the federal government has a role to play in reducing the incidence of these crimes in our nation. The dispute, then, centers not on whether Congress should act in this area, but rather on what should be done at that national level.

Although well intentioned, S. 625, the Local Law Enforcement Act of 2001, is the wrong approach. Without sufficient justification, this legislation strains the constitutional limitations imposed on Congress and supplants the traditional powers of state and local law enforcement. Even more troubling, the legislation would in many cases provide less protection than existing laws to victims of violent hate crimes. The Hatch substitute, on the other hand, would bring progress in our fight against hate crimes without creating any of these problems.

II. FAILINGS OF THE LOCAL LAW ENFORCEMENT ACT OF 2001

The Local Law Enforcement Act of 2001 would raise five substantive policy concerns if enacted in its present form. The majority of these problems proceed from the flawed and unverified premise that underlies the legislation: states are unable or unwilling to prosecute hate crimes. From that premise the legislation proceeds to enact a new layer of unnecessary, far-reaching federal criminal legislation.

A. Usurping the Traditional Police Power of the States

S. 625 would wreak havoc on one of the foundations of our constitutional structure, namely, the first principles of federalism that for more than two centuries have vested states with primary responsibility for prosecuting crimes committed within their boundaries. This legislation continues the accelerating trend toward federalizing essentially local criminal conduct—a trend that has provoked criticism from distinguished legal commentators and organizations, including the ABA and the Chief Justice of the United States.[60] According to these critics, Congress should only federalize

[60] *E.g.,* "The Federalization of Criminal Law," Task Force on the Federalization of Criminal Law, American Bar Association, Criminal Justice Section (1998); William H. Rehnquist, Address to the American Law Institute, Remarks and Addresses at the 75th Annual ALI Meeting, May 1998, at 15–19 (1988), also excerpted in Chief Justice Raises Concerns on Federalism, 30 The Third Branch, June 1998, at 1.

local criminal conduct when the need is apparent and demonstrated.[61]

Here, though the need is neither apparent nor demonstrated,[62] S. 625 would make every violent crime motivated by animus toward certain classes a federal matter. Forty-five states and the District of Columbia already have enacted hate crimes laws, and by any measure they are aggressively and effectively prosecuting these cases. We certainly are open to being persuaded that the states are failing to prosecute these crimes. But neither the majority's views nor the record developed in support of this legislation come close to making such a case.[63] In fact, the record would suggest quite another conclusion. The successful local prosecutions of those who perpetrated the reprehensible murders of Matthew Shephard in Laramie, WY, and James Byrd, Jr., in Jasper, TX should stand as a testament to the fact that wholesale federal intervention is not warranted.[64]

Recognizing that the case for S. 625 cannot be made on the basis of states' failure to vigorously bring these types of prosecutions, the supporters of this bill conflate that alleged concern with the difficulties presented by the existing federal statute's requirement concerning "federally protected activities."[65] *See* 18 U.S.C. § 245(b)(2); Committee Report at 5–6. But tellingly, the proposed legislation goes far beyond merely fixing a troublesome jurisdictional requirement. It instead proposes a wholesale jurisdictional

---

[61] The Federalization of Criminal Law," at 12.

[62] According to the most recent statistics available from the Federal Bureau of Investigation, there were 19 reported "hate-crimes" murders in the United States in 2000. While this number is 19 too many, it is far smaller than the 15,517 murders committed that year. Similarly, there were 17 reported "hate-crimes" murders in 1999, compared to the 15,533 murders committed that year.

[63] The committee report cites 17 examples of "violent hate crimes not covered by existing [federal] law." Committee Report at 26–31. As these examples were inserted into the report long after the May 1999 hearings on this bill, it is difficult to assess their real value. It is crystal clear, however, that each of the 17 examples could be prosecuted under existing state laws, for a violent assault is a crime in every local jurisdiction throughout the United States. Even the most cursory examination of these 17 examples, moreover, makes clear that states are not forsaking their obligation to prosecute these serious offenses. It is most telling that the report fails even to note where the state and local prosecutions have been successful. For example, the two perpetrators of the December 1993, Humboldt, NE example were convicted and one was sentenced to death, while the other received life in prison; the perpetrator of the February 15, 1999, Yosemite National Park, CA example is currently on trial in which state prosecutors are seeking the death penalty; and local prosecutors charged two suspects with murder in the June 2000, New York, NY example. Some of the other examples relied on by the majority are of dubious value. Where diligent local investigations have uncovered no suspects (*see, e.g.,* January 2000, Boston, MA; June 9, 2001, Washington, D.C.; August 26, 2001, Leawood, KS; and September 2001, San Antonio, TX examples), there is no reason to believe that S. 625 would lead to a different result. And the November 2, 2001, Cedaredge, CO example, cited in the report as a death some believed "might have been a hate crime" (Committee Report at 31), has been deemed by every independent law enforcement officer who reviewed the facts—from the Coroner to the District Attorney to the Chief of Police—as a suicide.

[64] Oddly, the committee report cites these successful local prosecutions to evidence the shortcomings in current law. *See* Committee Report at 7. This is so, the report concludes, because local prosecutions can be stymied by a lack of resources. The answer to this concern is appropriate federal funding—something we have never opposed and, indeed, something we proposed to do in the Hatch substitute amendment. The possible lack of local resources in some small number of cases surely does not justify the far-flung jurisdictional power grab in S. 625. Nor can one seriously contend otherwise. The committee report itself favorably refers to the federal role in the prosecution of the killers of James Byrd, Jr.—a feat that was accomplished under current law. *See* Committee Report at 4.

[65] Of course, there is nothing sinister about the "federally protected activities" requirement in 18 U.S.C. § 245(b)(2), which was passed in 1968. Rather, the drafters of that legislation were committed to crafting legislation that carefully balanced federalism concerns with the need to protect the newly-won civil rights of our nation's racial minorities. Furthermore, as any fair-minded student of American history would attest, the need for the 1968 legislation was infinitely more apparent than any proposed justification for S. 625. All sides to this debate would agree, one hopes, that America has come a long way since 1968.

grab by the federal government of enforcement powers traditionally and constitutionally reserved to the states.

Thus, rather than addressing a pressing need, this legislation will be perceived by many as the federal government's latest effort to enact criminal legislation driven not by necessity, but political popularity. Federal involvement is required where we find both an identifiable problem of national concern and a structural incapacity of state and local government to deal with that problem.[66] At the same time, we are obligated to and should avoid "feel-good, do-something" federal criminal legislation[67] that overburdens the federal criminal justice system and represents, at best, "symbolic gestures to appease the public rather than actual attempts to reduce crime."[68]

B. Federalizing Rapes and Sexual Assaults

The majority's inclusion of gender as a protected class in the legislation dramatically heightens the federalism concerns described above. Including gender threatens to expand federal criminal jurisdiction throughout the country over every rape, every domestic dispute, and every assault between genders.

This expansion of jurisdiction, too, is patently unnecessary. The record with regard to this legislation is deafeningly silent on the need for this massive expansion of federal jurisdiction. One cannot seriously contend that states have failed to fulfill their traditional role of prosecuting such crimes. Indeed, the majority fails to identify a single case where state or local authorities have refused to bring appropriate charges. Simply stated, there is no record established that would support the federalization of every case motivated in part by gender. Notably, the Congress, despite developing a record far more substantial than that found here, has twice enacted legislation (in 1994 and 2000) to combat violence against women that, though far-reaching, does not reach the breadth of cases that S. 625 would subject to federal jurisdiction.[69]

C. Weakened Punishment for Victims of Hate Crimes

The third significant problem with this legislation is that it actually threatens to weaken the punishment available for the perpetrators of violent hate crimes. In the prosecutions of the killers of James Byrd, Matthew Shepard, and Billy Jack Gaither, local prosecutors and law enforcement officials were able to consider seeking the death penalty. In the cases of James Byrd and Billy Jack Gaither, the death penalty was successfully pursued; in the case of Matthew Shepard, the possibility of the death penalty led to an early plea bargain that saved scarce local resources and resulted in life sentences for both defendants. Right now, in a case in rural northern California, state prosecutors are pursuing capital

---

[66] *See* Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation,* 543 Annals Am. Acad. Pol. & Soc. Sci., 15, 20–21 (1996).

[67] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: The Law as Equilibrium,* 108 Har.L.Rev. 26, 71 (1994).

[68] Nancy E. Marion, A History of Federal Crime Control Initiatives 244 (1994).

[69] *See* 1994 Violence Against Women Act, Pub. L. No. 103–322; Violence Against Women Act of 2000, Pub. L. No. 106–386.

charges against two brothers charged with murdering a gay couple.[70]

S. 625, while federalizing hate crimes, authorizes nothing more than life in prison for those who murder out of bigotry, prejudice, or hatred. If the defendants in the murders of James Byrd and Billy Jack Gaither had been prosecuted under S. 625, they would not have received the death sentences that they eventually received under state law. Had the case pending in northern California been brought under this legislation, the death penalty would not be available. S. 625 therefore would provide a decided benefit to those who would commit these heinous crimes. Not only would it undermine existing state laws, but S. 625 also would substantially weaken their protections. Consequently, this legislation would be less likely to deter future hate crimes.

D. Practical Difficulties for State and Local Authorities

S. 625 will also create significant practical difficulties for state and local prosecutors. Aside from having to determine whether a crime qualifies as a hate crime (which can often be a difficult task) prosecutors will now also have to determine whether the case should be brought in state or federal court. One wonders whether the supporters of this bill contemplate that local authorities, upon learning that a suspect once made racist statements, will have to halt their investigation and locate an Assistant Attorney General here in Washington, D.C. for further instructions. What is more, any particular crime could, upon discovery of additional evidence, become a potential hate crime at any stage in the investigation or prosecution of a case. Besides being cumbersome, the structure enacted by S. 625 does not facilitate an efficient division of labor between federal, state, and local law enforcement entities.

Moreover, the legislation will have a chilling effect on plea bargaining, a key component of our criminal justice system. Any competent criminal defense attorney will demand binding assurance from the federal government that it will decline prosecution before entering into a plea agreement with state authorities on hate crime charges. Such global dispositions are difficult to negotiate and frequently undermine the government's ability to prosecute later-discovered crimes committed by the defendant. In addition, the federal government will have effective veto power over state plea and sentencing agreements in virtually all hate crime cases.

S. 625's certification requirement clearly invites mischief. It is not difficult to imagine situations in which the Justice Department decides that a state "does not intend to exercise jurisdiction" despite the state's assertions to the contrary. The Justice Department may decide, for example, that the state's investigation is taking too long and the state is not sufficiently serious about exercising jurisdiction. The bill does not provide that the federal government will defer to a state's assertion of jurisdiction, only that it will consult with the state. Equally troubling, permitting the federal government to prosecute a case when it concludes that the state sentence leaves "demonstratively unvindicated the Federal interest in eradicating bias-motivated violence" will allow for potentially unfair,

[70] *See* "Williams Trial is Delayed Again," The Record Searchlight, May 2, 2000.

successive prosecutions of defendants. It also will subject the states to federal second guessing on every hate crime investigation and prosecution.[71] The potential for federal intervention at any stage of the case will create disincentives to moving forward at the local level and thereby jeopardize the effective investigation and prosecution of these cases.

E. Concerns Regarding the Constitutionality of the Legislation

Finally, recent Supreme Court precedent may raise significant questions concerning the constitutionality of S. 625. Such questions may arise, for example, regarding the inclusion of gender as a protected class under the bill, since there is no record and not even any substantial findings to support the inclusion of gender. While the provisions of S. 625 may ultimately pass constitutional muster, these questions will surely generate substantial litigation that could be avoided by enacting the Hatch substitute, which, instead of rushing headlong to federalize hate crimes, establishes a reliable study to determine the appropriate scope of federal hate crimes legislation and provides assistance to state and local law enforcement agencies in the prosecution of hate crimes.

III. A MEASURED APPROACH: THE HATCH SUBSTITUTE

The substitute amendment offered in committee by Senator Hatch would advance our nation's fight against hate crimes without creating the problems described above. This alternative provided for a cross-sectional study to help determine the form that any additional federal hate crimes legislation should take. The study would have collected and analyzed statistics on hate crimes both in states that currently have hate crimes laws and in those states that currently do not have such laws. Specifically, the study would have examined the number of hate crime offenses reported and investigated; the percentage of hate crimes prosecuted and the conviction rate; a comparison of the length of sentence imposed on those convicted of hate crimes; and references to and descriptions of the laws under which the offenders were punished. Based on these statistics, the Comptroller General would have submitted a report to Congress detailing the extent of hate crime activity and the success of state and local officials in prosecuting hate crimes. The study would have identified trends in the commission of hate crimes by geographic region, by the type of crime committed, and by prosecution and conviction rate. Thus, the study would have provided Congress with a more comprehensive factual basis for determining whether, and to what extent, the federalization of hate crimes is an appropriate response to the states' efforts, instead of largely assuming that state and local governments are incapable of addressing hate crimes.

The other important component of the Hatch alternative would have provided for federal assistance to states and localities that need help to fight hate crime. Specifically, the alternative would have allowed the Attorney General, at the request of a state or locality, to provide technical, forensic, prosecutorial, and any other as-

[71] The concern about federal second guessing is not idle speculation. As the committee report clearly states, supporters of S. 625 envision that federal authorities will step in whenever state and local prosecutors fail to bring "appropriate state charges." Committee Report at 4.

sistance in the investigation and prosecution of hate crimes. It also would have allowed the Attorney General to provide grants of up to $100,000 per case to assist states and localities in investigating and prosecuting hate crimes. The majority report cites the difficult intent element of the existing federal hate crimes statute, 18 U.S.C. § 245(b)(2), as the primary obstacle to the provision of federal assistance to state and local law enforcement and, concurrently, the need for an expansive federal hate crimes statute. Committee Report at 4–5. The Hatch alternative would have achieved the goal of enabling federal assistance for the prosecution of hate crimes by state and local law enforcement without unjustifiably federalizing the prosecution of hate crimes.

IV. CONCLUSION

There exists widespread agreement that the federal government must play a role in our nation's efforts against hate crimes. But the role we define must respect the Constitution and the structure of our government, a structure that assigns to the states the primary role in criminal law enforcement. Rather than take a precipitous step that would potentially make every criminal offense motivated by a hatred of someone's immutable traits a federal offense, we should equip states and localities with the resources necessary to undertake these criminal investigations and prosecutions on their own. At the same time, we should undertake a comprehensive analysis of the raw data that has been collected pursuant to the 1990 Hate Crime Statistics Act, including a comparison of the records of different jurisdictions—some with hate crimes law, others without—to determine whether there is, in fact, a problem in certain states' prosecution of those criminal acts constituting hate crimes. The Hatch substitute is a measured legislative response that would accomplish both of these goals.

Perhaps the study authorized by the Hatch substitute would demonstrate the need for legislation such as the Local Law Enforcement Act of 2001. To date, however, the case has not been made.

ORRIN G. HATCH.

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 625, as reported, are shown as follows (existing law proposed to be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Part	Section
I. CRIMES	**1**

* * * * * * *

PART I—CRIMES

Chapter	Section
1. General provisions	**1**

* * * * * * *

CHAPTER 13—CIVIL RIGHTS

Sec.
241. Conspiracy against rights.

* * * * * * *

248. Freedom of access to clinic entrances.
249. Hate crime acts.

§ 241. Conspiracy against rights

If two or more persons * * *

* * * * * * *

§ 248. Freedom of access to clinic entrances

(a) Prohibited activities.—Whoever—

* * * * * * *

(e) Definitions.—As used in this section:

(1) Facility.—The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive

health services, and includes the building or structure in which the facility is located.

* * * * * * *

(6) State.—The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

§ 249. Hate crime acts

(a) IN GENERAL.—

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, OR DISABILITY.—

(A) IN GENERAL.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED.—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

(b) CERTIFICATION REQUIREMENT.—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that—

(1) he or she has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, or disability of any person was a motivating factor underlying the alleged conduct of the defendant; and

(2) he or his designee or she or her designee has consulted with State of local law enforcement officials regarding the prosecution and determined that—

(A) the State does not have jurisdiction or does not intend to exercise jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

(C) the State does not object to the Federal Government assuming jurisdiction; or

(D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

(c) DEFINITIONS.—In this section—

(1) the term "explosive or incendiary device" has the meaning given the term in section 232 of this title; and

(2) the term "firearm" has the meaning given the term in section 921(a) of this title.

* * * * * * *

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

Part	Section
I. ORGANIZATION OF COURTS	1

* * * * * * *

PART I—ORGANIZATION OF COURTS

Chapter **Section**
1. Supreme Court **1**

* * * * * * *

PART II—DEPARTMENT OF JUSTICE

31. The Attorney General **501**

* * * * * * *

CHAPTER 33—FEDERAL BUREAU OF INVESTIGATION

Sec.
531. Federal Bureau of Investigation.

* * * * * * *

§ 534. Acquisition, preservation, and exchange of identification records and information; appointment of officials

(a) The Attorney General shall—

* * * * * * *

HISTORICAL AND STATUTORY NOTES

* * * * * * *

Hate Crime Statistics

Pub.L. 101–275, Apr. 23, 1990, 104 Stat. 140, provided:

"That (a) this Act [this note] may be cited as the 'Hate Crime Statistics Act'.

"(b)(1) Under the authority of section 534 of title 28, United States Code [this section], the Attorney General shall acquire data, for each calendar year, about crimes that manifest evidence of prejudice based on race, *gender,* religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.

* * * * * * *

○